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RETAIL COMPETITION IN THE ELECTRIC UTILITY INDUSTRY

DAVID C. HJELMFELT*

Retail competition among electric utilities has long been recognized as not being in the public interest.[1] There is reason to believe that today retail competition may in fact be in the public interest. Regulatory practices, however, often prevent or restrict such competition.

I. THE NATURE OF RETAIL COMPETITION

Retail competition—that is, competition for sales to ultimate consumers of electricity—may take a variety of forms. First, distribution facilities may be duplicated, permitting door-to-door competition.[2] Second, utilities may compete for customers along the fringes of their service territories.[3] Third, interfuel competition may exist between an electric utility and an alternative fuel supply, such as natural gas. Fourth, electric utilities may compete for a franchise to serve a block of customers at retail. Fifth, utilities may compete to attract new industries to their service territories.[4] Sixth, performance comparisons between electric utilities may provide a form of yardstick competition.[5]

The focus of this article is on the first two forms of retail competition—door-to-door or direct and fringe area—for these are the competitive forms most often discouraged by regulation. Of these forms, fringe area competition requires some elaboration.

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1. Watson & Brunner, *Monopolization by Regulated Monopolies: The Search for Substantive Standards*, 22 ANTITRUST BULL. 559, 566 (1977); *compare* Kellman & Marino, City of Cleveland v. CEI: *A Case Study In Attempts To Monopolize By Regulated Utilities*, 30 CLEV. ST. L. REV. 5 (1981) (claiming advantages of retail competition).

2. Although this form of competition is considered unusual in the electric utility industry, no reliable statistics quantify the extent of the competition. Notable examples of door-to-door competition are found in the cities of Cleveland, Ohio, and Lubbock, Texas.

3. Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 COLUM. L. REV. 64, 94 (1972).

4. Most investor-owned utilities engage in efforts to attract new industry to their service area. Some economists have argued that electric rates have little impact in attracting customers to a utility's service area. *But see* Pace, *Relevant Markets and the Nature of Competition in the Electric Utility Industry*, 16 ANTITRUST BULL. 725 (1971). However, the Federal Energy Regulatory Commission (FERC) staff took the opposite approach in testimony filed in Minnesota Power & Light Co. in Docket No. ER78-425 (FERC 1978).

5. Even critics of yardstick competition recognize that performance comparisons may provide an effective means of applying pressure on electric utilities to improve performance. Pace, *supra* note 4, at 764-65; Stelzer, Testimony before the Nuclear Regulatory Commission, Consumers Power Co. (Midland Plant, Units 1 and 2) in Docket Nos. 50-329A and 50-330A (NRC), cited at 6 NRC 892, 982 (1977).

A. *Fringe Area Competition*

Fringe area competition generally occurs between a municipal system and an investor-owned system, a municipal system and a rural electric cooperative, or a rural electric cooperative and an investor-owned utility. Many investor-owned utilities have refrained from competing for fringe-area customers, even when free to do so. Ohio Edison Company, Toledo Edison Company, and the Cleveland Electric Illuminating Company agreed in the early 1960's not to compete.[6] In one instance a municipal system engages in fringe-area competition with both a cooperative and an investor-owned utility,[7] and in at least one situation, two municipal systems compete.[8]

No matter what the identity of the competing entities, most will likely compete to provide service to suburban residential areas, shopping centers, strip commercial areas, and industrial areas. The latter two categories are usually the most hotly contested.[9] These areas tend to provide high revenue per customer and high revenue per dollar of plant investment because of the large load per customer. Such areas are considered valuable additions to a utility's service area.

1. Restraints on Fringe Area Competition

Fringe area competition may be restrained through the exercise of a municipality's franchise power, by state statute,[10] by agreements between the parties, or by restraints imposed by a wholesaler on the area in which power can be sold at retail (usually an area of competition in which the wholesale supplier also sells at retail).[11] Recent changes occurring in the relationship between electric utilities and their customers, largely as a result of the Public Utility Regulatory Policies Act of 1978 (PURPA),[12] may further reduce retail competition. For example, there is a renewed emphasis on co-generation, in which an industry that requires heat in its manufacturing process can utilize waste process heat to generate electricity both for its own use and for sale to an electric utility. Former Federal Energy Regulatory Commission (FERC) Chairman Curtis stated that he would favor policies encouraging utility ownership of up to fifty percent of the co-generation facility.[13] The resulting close relationship between the utility and the industrial user makes it unlikely that the industrial user would respond to competitive overtures from another electric utility.

However, it has also been argued that co-generation could force increased competition in the form of generation cost comparisons, potential

6. Toledo Edison Co., 10 N.R.C. 265 (1979).

7. Dothan, Ala.

8. City of Fairhope, Ala., and Riviera Utilities Co., owned by the City of Foley, Ala.

9. W.R. Mayben, Legal, Engineering and Economic Aspects of Service Area Disputes (Oct. 29, 1973) (paper presented to American Public Power Ass'n Legal Seminar).

10. Meeks, *supra* note 3, at 95.

11. For example, the wholesale contracts of Ohio Edison as they existed in the early and mid-1960's employed such restraints. *See* Toledo Edison Co., 10 N.R.C. 265 (1979).

12. Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 15, 16, 30, 42, 43 U.S.C.).

13. Inside FERC, Nov. 3, 1980, at 2.

loss of major retail industrial customers, and competition from co-generators for sales at wholesale to existing distribution systems.[14]

The potential for new co-generation facilities may be large. According to the Edison Electric Institute, co-generators in 1900 produced half the nation's electricity—a figure that had declined to five percent by 1974.[15] Co-generation provides a great increase in fuel efficiency. A typical electric utility is thirty-two percent efficient, while a co-generator may be eighty percent efficient.[16]

Also, as a result of PURPA, utilities are inserting remotely controlled load management devices in houses and commercial buildings. Utilities are also investing in energy conservation features in individual homes, such as attic insulation or thermal storage heaters, for which customers pay a monthly fee.[17] The resulting blurring of the distinction between consumer and seller will further reduce opportunities for retail competition between electric utilities.

II. Regulation Is Not a Substitute For Competition

Economists who favor competition believe it will produce the most efficient allocation of resources over long periods of time.[18] Presumably, management faced with competition will be forced to adopt the best technology and provide the best service at the lowest cost. On the other hand, when no competition exists output will be reduced as management maximizes profits. Service may be reduced because sales are assured even when consumers are not treated well.

Historically economists identified certain utility firms as local monopolies; in a very restricted geographic area, one utility could most efficiently serve the demand. Over time, and with no real factual support, this concept was expanded until utilities were considered natural monopolies regardless of where they provided services.[19] Under the natural monopoly concept, economists, regulators, and legislators concluded that it was inefficient to have two utilities serving the same area. Thus, to insure the most efficient allocation of resources and at the same time prevent exploitation by the utility, utilities were allowed to maintain a monopoly status, but were subjected to regulation.[20]

Two factors draw in question the premise that retail competition between electric utilities should be discouraged. The first is the recognition that regulation is an inadequate substitute for competition; the second is that traditional natural monopoly theories have been inappropriately ap-

14. Jones, *The National Energy Act and State Commission Regulation*, 30 Case W. Res. L. Rev. 324 (1980).

15. The Wall St. J., Feb. 19, 1981, at 33, col. 4.

16. *Id.*

17. Public Power Weekly, Oct. 6, 1980, at 2.

18. Hamilton, *Forward to Public Utility Law Symposium*, 30 Case W. Res. L. Rev. 220 (1980).

19. Dr. Wein, testimony in City of Cleveland v. Cleveland Elec. Illuminating Co., No. C75-560, Tr. 18, 819-30 (N.D. Ohio 1980).

20. W. Shepherd & W. Clair, Public Policies Toward Business 348 (1979).

plied. This section deals with the adequacy of regulation as a surrogate for competition.

A. *Current Regulatory Practices*

Former Federal Power Commission (FPC) Chairman Lee White has been very critical of regulation. White states that: "The game is not Company A trying to provide better service at lower prices than all other companies, but rather Company A attempting to secure the highest rate the regulatory bodies will permit."[21] In general, state commissions "operate with inadequate budgets and are no match for the power companies with great sums of money at stake."[22]

Even when administered well, rate regulation does not insure that rates charged by electric utilities will be the same as rates in a competitive atmosphere.[23] Reasonable rates fall within a zone rather than at a discrete point. A rate may not be so high as to warrant rejection by the regulatory commission, and yet the same rate may be higher than the rate the electric utility would accept under the pressure of competition.[24] When rate regulation is not administered well, utility rates may be even higher. The principal rate engineer for the Cleveland Electric Illuminating Company has stated that as late as 1976 an electric utility could get as high a return as it wanted on equity under Ohio rate regulation. Competition from natural gas utilities provided the only check on rates.[25]

Not only does regulation fail to control rates adequately, it cannot insure efficient management or efficient allocation of resources. A tendency toward over-capitalization clearly exists under present regulatory schemes.[26] Moreover, a regulated company's right to recover cost increases by raising rates has had a tendency to lessen utility resistance to unreasonable wage demands.[27] The current use of automatic rate increases to pass on fuel cost increases eliminates incentive to shop for the best fuel prices.[28] Other observers have noted that private utility companies often are managed poorly because of their freedom from competition.[29] Absent competition, inef-

21. Lee White, *The Right to Federally Generated Power* 21 (Public Power Ass'n June 11, 1979).

22. *Id.*

23. Moore, *The Effectiveness of Regulation of Electric Utility Prices*, 36 S. ECON. J. 365 (1970).

24. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1235 (1969).

25. Bingham, testimony in City of Cleveland v. Cleveland Elec. Illuminating Co., No. C75-560, Tr. 2905 (N.D. Ohio 1980). For example, the Cleveland Electric Illuminating Co. has received 92.2% of the rate increases it has requested from 1970 through 1979. Cleveland Press, July 10, 1980, at 4A, col. 3.

26. Averch and Johnson, *Behavior of the Firm Under Regulatory Constraint*, AM. ECON. REV. 1052 (1962); Hughes, *Scale Frontiers in Electric Power*, in TECHNOLOGICAL CHANGE IN REGULATED INDUSTRIES 44 (W. Capron ed. 1971).

27. Turner, *supra* note 24, at 1232.

28. Interestingly, it has also been argued that fuel adjustment clauses may encourage utilities to use fuel intensive technologies rather than making capital investments that might save fuel in the long run. Whether current regulation leads to over-capitalization or under-capitalization, the end result remains a misallocation of resources. Leaffer, *Automatic Fuel Adjustment Clauses: Time For a Hearing*, 30 CASE W. RES. L. REV. 228 (1980).

29. C. ELLIS, A GIANT STEP 90-91 (1966). In the past the electric utility industry grew and prospered in spite of management. Fraser, *Utility Bond and Commercial Ratings*, PUB. UTILITY

ficient firms and inefficient management have been recognized as being under little or no pressure to minimize costs, and are unlikely to be displaced by those who can do better.[30] For example, in February 1980, the White House Office of Consumer Affairs joined the state of North Carolina in asking FERC to initiate an unprecedented investigation of the management of Virginia Electric and Power Company.[31] They alleged that the company's plants were "extremely unreliable" and that the company "may have failed to pursue conversion of oil-fired generating facilities to coal-fired as expeditiously as possible."[32]

Under the present system of utility regulation, many important matters are left to the utility manager's discretion with little or no regulatory review. Among the areas receiving little regulatory attention are: 1) reserve levels, 2) reliability criteria, 3) depreciation rates, 4) type, size, and mix of generating resources, 5) new product development, 6) research expenditures, 7) aggressiveness in dealing with suppliers, and 8) salvage of obsolete plants. In most instances these matters would be more responsive to competition than to regulation.[33]

If utility regulation is not performing the tasks assigned within an acceptable margin of error, the commonly accepted justification for substituting regulation for competition must be examined. Although not the only rationale for economic regulation, the concept of natural monopoly is the traditional and most persuasive argument supporting regulation.[34] In large measure then, the substitution of state regulation for competition in electric utilities must stand or fall on the application of natural monopoly theories to the distribution of electricity at the retail level.

III. Is the Retail Distribution of Electricity Characterized By Natural Monopoly Tendencies?

In general terms, a natural monopoly may be said to exist when one firm can satisfy the demand in a market at a lower cost than if two or more

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FORTNIGHTLY, Sept. 27, 1973, at 42, 44. Other observers have concluded that the public power sector which is subject to less formal regulation attracts a more competent management. Newberg, *Two Issues in the Municipal Ownership of Electric Power Distribution Systems*, 8 BELL J. ECON. 303 (1977). The overall cost of management is less with publicly owned systems. Hamilton, *supra* note 18, at 223.

30. Denison, *Explanations of Declining Productivity Growth*, SURV. CURRENT BUS., Pt. II, Aug. 1979, at 14-15.

31. *White House Seeks Probe of Vepco*, PUB. POWER WEEKLY, Mar. 17, 1980, at 6.

32. *Id.*

33. The Alabama Public Service Commission concluded that the Alabama Power Co. had not conducted its business in the most efficient manner, saying that:

> We are of the opinion and believe that this record shows that the proper exercise of "efficient and economical management" dictates that the Company take advantage of opportunities to divest itself of 25% of the Farley nuclear plant, either to company affiliates or to the rural Electric Cooperatives and municipal utilities. Such an action by the Company would make its rates more reasonable to the public.

The Commission, however, was without authority to compel the company to operate more efficiently. Alabama Power Co., No. 17094 at 5-6, (APSC July 12, 1976), *aff'd in pertinent part*, Alabama Power Co. v. Alabama Public Serv. Comm'n (Montgomery County Civ. Ct., Aug. 11, 1976).

34. Fanara, Suelflow and Draba, *Energy and Competition: The Saga of Electric Power*, 25 ANTITRUST BULL. 125, 126 (1980).

firms serve the market.[35] At the outset, it is important to note that the general definition is in terms of providing a service, rather than a product, i.e. the retail distribution of electricity. Also, the focus is on cost to the firm rather than on price to the consumer. Thus, even if a firm serving a retail market were to achieve lower costs as a monopoly, it does not follow that the resulting price to the consumer would be lower than if two firms competed to serve the market.

Economic literature presents no standard definition of natural monopoly theory, and different economists specify different sets of conditions necessary for natural monopoly.[36] One commentator, Primeaux, has identified various attributes of natural monopoly and has categorized those which are or are not dependent on economies of scale[37]—for their implementation or existence. The attributes dependent upon economies of scale include: 1) economies of scale in production, 2) relatively high fixed costs, 3) a single producer able to operate at lower costs than if two or more firms serve the market, 4) the impossibility of a large number of competing plants, 5) higher customer prices if more than one firm serves the market, and 6) a high degree of price elasticity. Attributes not dependent on economies of scale include: 1) the necessity for the product or services supplied, 2) inconvenience to customers caused by duplication of facilities, 3) use of products or services at the place of production, 4) the existence of special limitations on raw materials, and 5) an industry characterized by secrecy.[38]

The characteristics of a natural monopoly identified by Primeaux outnumber the characteristics that most economists would attribute to a natural monopoly. However, other economists would add the elements of time and a stable technology.[39] Power production technology is presently undergoing changes. Generating unit sizes advanced rapidly during the period from 1965 to 1980, with typical units increasing from around 250 megawatts (mw or 1,000 kilowatts) to as large as 1300 megawatts (mw) for nuclear units. A very real possibility exists that a long-term trend toward the use of alternative energy sources such as solar power, wind generation, and the development of small hydrogenerating stations will reverse the trend of central station service.[40]

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35. A natural monopoly is one "resulting from economies of scale . . . such that one firm of efficient size can produce all or more than the market can take at a remunerative price, and can continually expand its capacity at less cost than that of a new firm entering the business." Northern Natural Gas Co. v. FPC, 399 F.2d 953, 965 n.19 (D.C. Cir. 1968) (quoting C. KAYSEN & D. TURNER, ANTITRUST POLICY 191 (1959)).

36. Primeaux, *Some Problems With Natural Monopoly*, 24 ANTITRUST BULL. 63 (1979).

37. Primeaux defines economies of scale as existing when unit price declines as the scale of production increases. *Id.* at 64.

38. *Id.* at 64-65.

39. Dr. Wein, testimony in City of Cleveland v. Cleveland Elec. Illuminating Co., No. C75-560, Tr. 18,819-30 (N.D. Ohio 1981).

40. *See* Feldman and Giordano, *Financing Dispersed Generation Projects*, 37 PUB. POWER MONTHLY, Mar.-Apr. 1979 at 31. P. AREEDA & D. TURNER, 3 ANTITRUST LAW ¶ 621a at 48 states that "[d]emand may total millions of dollars annually and yet be 'too thin' *relative* to the minimum efficient scale of . . . a hydroelectric power generator . . . ." (emphasis in original). Changes in production costs and technology have lead to a flurry of applications for development of small hydro projects.

Because the natural monopoly theory is concerned with the firm rather than the function, production and transmission costs must be considered, as well as costs of retail distribution. In considering the impact of economies of scale, long-run decreased costs resulting from expansion of plants must be distinguished from short-run decreased costs resulting from better utilization of existing plants. Only the former is relevant to natural monopoly theory. The latter condition is not necessarily related to increasing returns of scale.[41]

A. *Economies of Scale*

Although economies of scale do exist in the production of electricity, such economies do not continue indefinitely. A study examining economies of scale in 114 firms revealed that in 1970 a larger share of electrical energy was generated by firms that had grown beyond the size at which they experienced economies of scale.[42] A study of direct competition among electric utilities found that competition forced firms reaching levels of production up to 222 million kilowatt-hour (kwh) to produce at a lower average cost than they would in a non-competitive environment.[43] Primeaux suggests that monopoly structure generates x-inefficiency, which raises costs of production. Any cost benefits from economies of scale are more than countered by the x-inefficiency.[44] Thus, even where economies of scale do exist, they are unimportant as an attribute of natural monopoly.[45] Studies demonstrating the exhaustion of economies of scale and the effects of x-inefficiency have led some commentators to conclude that no natural monopoly results from economies of scale at the generation level.[46]

Related to economies of scale is the fact that electric utilities have a high fixed-cost investment in relation to the revenue generated. The ratio of capital investments to revenue in the electric utility industry is about 4 to 1; for the steel industry, 1.7 to 1; and for retail stores, .3 to 1. The high fixed-cost ratio of electric utilities by itself has been argued as making utilities natural monopolies.[47] The capital employment in various industries is long lasting in some and short-lived in others. To allow for the differences in life of capital employed, Primeaux argues that if high fixed capital is relevant, the measurement should be in terms of output to depreciation of the capital

41. Primeaux, *supra* note 36, at 66.

42. Christensen & Greene, *Economies of Scale in U.S. Electric Power Generation*, 84 J. POL. ECON. 655, 656 (1976). Heuttner & Landon found the long run average cost curve to be U-shaped, with the lowest cost for firms ranging in size from 1600 mw to 3100 mw. Heuttner & Landon, *Electric Utilities: Scale Economies and Diseconomies*, 44 S. ECON. J. 883, 903, 907 (1978).

43. Primeaux, *A Reexamination of the Monopoly Market Structure for Electric Utilities*, in PROMOTING COMPETITION IN REGULATED MARKETS 175 (A. Phillips ed. 1975).

44. Primeaux, *supra* note 36, at 68.

45. *Id.*

46. Fanara, Suelflow and Draba, *supra* note 34, at 137; *see* Jarrell, *The Demand For State Regulation of the Electric Utility Industry*, J.L. & ECONOMIES 269 (1978); Meeks, *supra* note 3; Weis, *Antitrust In The Electric Power Industry*, in PROMOTING COMPETITION IN REGULATED MARKETS (A. Phillips ed. 1975); W. SHEPHERD & W. CLAIR, *supra* note 20.

47. R. CAYWOOD, ELECTRIC UTILITY RATE ECONOMICS 2 (1956). However, it must be kept in mind that regulation of the electric utility industry produces a tendency to over-capitalize.

employed.[48] Application of the output-to-depreciation measurement shows that capital requirements of electric utilities are not significantly different from those in industries not considered natural monopolies.[49]

B. *Customer Prices*

Another attribute of natural monopolies is that higher customer prices result when competitors enter the market. As shown above, even if lower costs resulted from having one producer in a market, there is no assurance that consumer prices will be lower. Conversely, with reference to the electric utility industry, it cannot be readily demonstrated that the presence of more than one firm in the retail market will produce higher consumer costs. Empirical evidence for this proposition is difficult to obtain because of the intervention of rate regulation. Primeaux relies on a comparison of rates between all cities served by the Missouri Utilities Company and the rates charged by the company in cities in which it faced competition. In all but two instances the rates were the same, regardless of whether competition existed. In two remaining cities, the rate was lower in Poplar Bluff, Missouri, where the company competed with a municipally-owned utility, and higher in Eldon, Missouri, where no competition existed.[50] The trouble with this type of analysis is that most horizontally integrated electric utilities use postage stamp rates, or rates based upon the company's cost of service to its entire service area. Thus, the rate to any individual city represents company-wide costs of service, rather than the actual cost of service to that particular city. The actual cost to serve customers in a particular city would equal company-wide costs only by coincidence. Substantial subsidization between groups of customers served by a utility may occur. Accordingly, the presence of competition could lead to higher consumer prices but for the company's policy of imposing postage stamp rates. As a result, the focus should be on the cost of serving a particular market.

Theoretically, it can be shown that the cost of service may be higher when one firm serves the market than where two firms serve the market.[51] If one assumes that the market considered is one city and that two firms exist in the market, only a detailed study of the location of the firms on their respective cost curves can reveal whether costs will be reduced if one firm serves the entire market. In the typical competitive situation, one firm would be a relatively small municipally-owned system and the other firm would be a much larger horizontally and vertically integrated investor-owned utility. Applying the results of one study,[52] the average total cost curve for the large utility will at some point begin to rise. Similarly, the average cost curve for the small firm's existing plant will first decline and then rise. However, the small firm, unlike the large firm, may yet obtain economies of scale by installing additional capacity to capture a larger share

48. Primeaux, *supra* note 36, at 70.

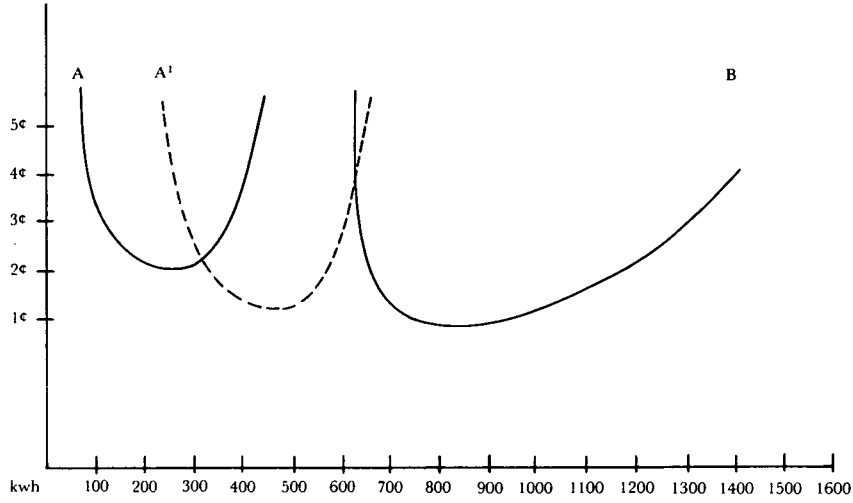
49. *Id.*

50. *Id.* at 78-79.

51. Dr. Wein so demonstrated as part of his testimony in City of Cleveland v. Cleveland Elec. Illuminating Co., No. C75-560, Tr. 18, 819-30 (N.D. Ohio 1981).

52. *See supra* authority cited in note 43 and accompanying text.

FIGURE 1.



Market is for 1400 kwh

A serves 400 kwh @ 4¢	$16.00)	$36.00
B serves 1,100 kwh @ 2¢	$20.00)	
A serves 100 kwh @ 5¢	$ 5.00)	$57.00
B serves 1,300 kwh @ 4¢	$52.00)	
A serves 300 kwh @ 2¢	$ 6.00)	$33.50
B serves 1,100 kwh @ 2.5¢	$27.50)	
A serves 200 kwh @ 2.5¢	$ 5.00)	$41.00
B serves 1,200 kwh @ 3¢	$36.00)	
A serves 0	$ 0.00)	$70.00
B serves 1,400 kwh @ 5¢	$70.00)	

of the load. On Figure 1, such a shift is downward and to the right to A^1.[53]

The calculations of cost to serve the market based upon the assumptions contained in Figure 1 demonstrate that it is quite possible for the cost of serving the market to be substantially higher if only one firm serves the market. In fact, it is apparent that total costs would be further reduced if a third firm serving 300 kwh entered the market at a time when Utility A served 300 kwh. The question then becomes one of whether Figure 1 sufficiently comports with reality to be of any analytical value. It is reasonable to conclude that it does.

1. Distribution and Design

Power production costs are by far the greatest portion of the cost of providing electric service. The incremental cost of providing service is generally rising. Distribution costs are generally not more than twenty percent of the cost of providing service. At least some evidence exists that distribution

53. All of the killowat hour (kwh) figures shown on Figure 1 are unrealistically low but serve to illustrate the theoretical concept.

costs may be lower in areas of competition than in areas of no competition.[54]

Moreover, there are no significant economies of scale in the distribution of electricity. In 1970, trends toward lower unit costs of distribution were noted to be approaching the point of diminishing returns. Overhead conductors were approaching practical limitations, and power factors had been raised to near unity. As primary circuit voltages increase to serve greater loads, the unit costs of line transformers, line switching, and protective equipment also increase, limiting overall potential savings.[55] In 1979, distribution economies were said to accrue from increased density of the service area but not necessarily from increased scale.[56]

The percent of the total cost of supplying retail power that is attributable to the operating cost of electric distribution has declined steadily. This result has largely been due to the tremendous increase in power production costs. Capital costs of distribution systems depend on a variety of managerial decisions that are not subject to regulatory scrutiny. The managerial decisions regarding distribution system design are not necessarily dictated by outside economic forces. To the extent that regulation promotes over-capitalization, the response may be to design a system of less than optimum efficiency.

The two major classes of distribution system design are: radial and network. At least a dozen common variations of the major classes exist, with the choice depending largely on the quality of service desired. The greatest problem may be in selecting the equipment components in various parts of a system that will provide the most economical design within the limits set. For example, certain types of systems may have inherently better means of regulating voltage than do others. Thus, when voltage regulation is provided at the distribution substation bus, auxiliary voltage regulation may be needed on primary distribution lines having different loading cycles, e.g., a residential feeder and an industrial feeder.[57]

Similarly, large distribution substations having many primary feeders of different lengths may require separate voltage regulation for each feeder. However, it may be less expensive to regulate voltage at the substation bus supplemented by pole-mounted regulators some distance from the substation as needed.[58]

A distribution system is cost sensitive to voltage because voltage must be maintained between fairly definite limits at the point of delivery to permit proper operation of equipment.[59] Maintaining closer limits than necessary will result in higher system costs. Therefore, automatic regulating devices must be carefully sized and located to insure economic system design.[60]

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54. Kemper, testimony in City of Cleveland v. Cleveland Elec. Illuminating Co., No. C75-560, Tr. 18, 385-89 (N.D. Ohio 1981).

55. FPC, *National Power Survey* (1970); Newberg, *supra* note 29, at 321.

56. U.S. Department of Energy, 2 THE NATIONAL POWER GRID STUDY 376 (1979).

57. Westinghouse Electric Corp., 3 ELECTRIC UTILITY ENGINEERING REFERENCE BOOK: DISTRIBUTION SYSTEMS 5 (1965).

58. *Id.* at 48.

59. *Id.* at 14.

60. *Id.*

Distribution engineering is, to a large extent, a matter of obtaining the most economic combination of system components. Many different sizes and ratings of equipment must be considered. This is particularly true in designing a system to serve areas of varying load densities with uncertain and different rates of load growth. Regulation cannot and does not provide significant oversight of the utility's efficiency in designing its system. The mere existence of regulation cannot be said to insure an optimal distribution system design.

More important to considerations of natural monopoly is the constantly changing nature of the area served. Thus, even if one assumed that a particular substation and feeder system were initially optimally designed, the design cannot be expected to remain optimal over the forty- to fifty-year life of the facilities. For example, if the substation initially served a residential neighborhood, with time the neighborhood may decay. Abandoned homes lead to excess capacity, and homes converted to businesses and apartments lead to a need to increase capacity. Some feeders from the substation may begin to serve industrial loads. As a result, additional less optimal voltage regulation may be required. If the firm no longer employs the lowest cost method in supplying service, its claim to natural monopoly is questionable.

The primary effect of retail competition is reduction of the density of the load served. Economically, the effect may be the same as holding the load constant and expanding the area served. An extensive area can be served by many distribution substations, each of relatively low kilovolt amphere (kva) rating, or by a smaller number of larger substations. As the system expands, transformer capacity, switching equipment, subtransmission lines, and primary feeder circuits must be added in practicable and economic increments.[61] However, a change in load resulting from competition does not always result in a substantial reduction of facilities required. For example, it is instructive to compare the facilities required to serve an area of twelve square miles with a 23 kilovolt (kv) primary feeder system in which the load density is 4000 kva per square mile with the facilities required to serve the same total load spread over a twenty-four-square-mile area. The load density for the twenty-four-square-mile area is 2000 kva per square mile or half the load density of the twelve-square-mile area. In each situation, one substation with a capacity of 4800 kva is required and five primary feeders are required.[62] Thus even economies claimed to be attributable to load density may prove to be ephemeral.

Other evidence also exists to demonstrate that the theoretical construct of Figure 1 is relevant for analysis of the natural monopoly status of electric utility firms. Primeaux's study of the cost of service in cities with competition is consistent with Figure 1.[63] Similarly, the Cleveland Electric Illuminating Company has made studies showing that its costs for service inside the city of Cleveland, where it faces vigorous competition, are comparable to

61. Westinghouse, *supra* note 57, at 72.
62. *Id.* at 84.
63. *See* Primeaux, *supra* note 36.

its costs for service in areas where no competition exists.[64] Additionally, economies of scale in management are probably smaller.[65]

IV. THE EFFECT OF COMPETITION

If indeed the electric utility industry is a natural monopoly, economic forces should dictate the disappearance of competition in the cities in which it exists. Evidence of long-term competition can be found. For example, competition has existed in the city of Cleveland, Ohio, for nearly seventy years. Competition has existed in Sikeston, Missouri, for approximately fifty years.[66] A study of competition in Cleveland concluded:

> After 20 years of rate regulation in Cleveland by means of competition, it is difficult to find any basis of fact in the contention that this means regulation is wasteful because of duplicate investment and thereby an ultimate burden on the consumers. The records show that the citizens of Cleveland have received the lowest rates in the entire country over a 20-year period, yet the competing utilities have both made enormous profits even at these low rates.[67]

When examining a situation in which competition exists, additional factors must be considered that will not be significant when the question is simply one of whether competition should be initiated. If two utilities are already competing, the costs of installing duplicating facilities are sunk costs. The sale of either utility is unlikely to occur unless the selling utility is able to recover in the sales price an amount equal to the cost of the facilities used to provide the service. Moreover, the sales price is frequently based upon the cost of replacing all facilities at current prices minus depreciation. Whereas the rates are usually based upon original cost of plant minus depreciation. Poles used in distribution construction are long-lived. Thus, reproduction cost new will be substantially greater than the actual cost of the plant used to provide the service. The purchasing utility will enter the cost of the plant at the cost paid, e.g. reproduction cost new. The stepped-up cost of the plant claimed to be used may affect rates charged by increasing the rate base of the competing utility.

Moreover, it is unlikely that the purchasing utility would immediately remove the duplicate facilities. More likely, the duplicate facilities will be left in place and used by the purchasing utility for a number of years. Duplicate facilities would be removed only when new construction causes relocation of pole lines to accommodate street widening or the like. This is particularly true of mature service areas where additional load growth is not of a magnitude to require a change in service.

The presumption that the electric utility industry is a natural monopoly and that competition is to be discouraged in favor of regulation is outmoded

64. Bingham, testimony in City of Cleveland v. Cleveland Elec. Illuminating Co., No. C75-560, Tr. 2905-07 (N.D. Ohio 1980).

65. F. MACHLUP, THE POLITICAL ECONOMY OF MONOPOLY 52 (1952).

66. Primeaux, *supra* note 36, at 78.

67. E. KENEALY, THE CLEVELAND MUNICIPAL LIGHT PLANT 109 (1935).

and does not comport with economic realities. To the extent that regulation rests upon natural monopoly assumptions, it must be reexamined.

V. ADMINISTRATIVE, JUDICIAL, AND LEGISLATIVE TREATMENT OF COMPETITION BETWEEN ELECTRIC UTILITIES

The general trend of legislative, administrative, and judicial treatment of competition between electric utilities has followed the old economic assumption of natural monopoly. Frequently, legislative policies have been influenced by industry lobbying. The underlying presumption has been that duplication of facilities to permit competition is wasteful. Deciding what is waste presupposes a number of value judgments as to the long-term good of society and presents difficult questions for philosophers and welfare economists. Courts are not well equipped to make such determinations. Moreover, a significant lag exists between the recognition of new "truths" by academicians and the acceptance of those "truths" by the courts. Judges tend to apply the law in accordance with economic theories prevalent when they were in college. Thus, the tendency is to freeze economic thought at given points until a new generation of jurists is seated.

Many court and administrative decisions have held, without critical analysis, that the electric utility industry is a natural monopoly. In *Cantor v. Detroit Edison Co.*,[68] the United States Supreme Court stated: "The very reason for the regulation of private [electric] utility rates—by state bodies and by the [Federal Power] commission—is the inevitability of monopoly. . . ."[69]

In *Jackson v. Metropolitan Edison Co.*,[70] the Court referred to electric utilities as natural monopolies created by the economic forces of high threshold capital requirements and virtually unlimited economies of scale. The Court said in *Otter Tail Power Co. v. United States*[71] that each town is "a natural monopoly market for the distribution and sale of electric power at retail."[72] In *Gulf States Utilities Co. v. FPC*,[73] the Court spoke of the "basic natural monopoly structure" of the electric power industry.

Other courts have also relied upon or referred to the presumed natural monopoly status of utilities. The Sixth Circuit Court of Appeals has referred to the natural monopoly possessed by a utility company in a city as a "classic case" of a lawful monopoly.[74] In *Lamb Enterprises, Inc. v. Toledo Blade Co.*,[75] a case involving competitors for community antenna television business, the

68. 428 U.S. 579 (1976).

69. *Id.* at 596 n.33 (quoting Otter Tail Power Co. v. United States, 410 U.S. 366, 389 (1973) (Stewart, J., dissenting)).

70. 419 U.S. 345 (1974).

71. 410 U.S. 366 (1973).

72. *Id.* at 369.

73. 411 U.S. 747, 759 (1973). In a broader context, the court has said that in "those areas, loosely spoken of as natural monopolies or—more broadly—public utilities . . . active regulation has been found necessary to compensate for the inability of competition to provide adequate regulation." FCC v. RCA Communications, Inc., 346 U.S. 86, 92 (1953).

74. Byars v. Bluff City News Co., 609 F.2d 843, 853 (6th Cir. 1979).

75. 461 F.2d 506 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972).

same court gratuitously stated that house-to-house competition for customers is not feasible for electric utilities.

The Court of Appeals for the District of Columbia has stated that competition between two electric suppliers would mean duplication and wasteful investment.[76] That court has also said that in natural monopoly markets, competition is sacrificed to avoid wasteful duplication of services and investment.[77]

In large part the above references to the natural monopoly status of the electric utility industry are dicta and based either upon conclusory testimony that merely parrotted traditional concepts or had no support in the record. Such statements are picked up and repeated in other decisions without further analysis, thereby perpetuating an assumption, the validity of which is doubtful. In what may be the only carefully litigated proceeding reaching a final decision as to the natural monopoly status of public utilities, the Atomic Safety and Licensing Board of the Nuclear Regulatory Commission found that a natural monopoly did not exist.[78]

The mistaken belief that competition by electric utilities is detrimental to the public interest has resulted in the enactment by at least forty states of legislation creating exclusive service territories.[79] However, where territorial divisions have not been mandated by legislation, voluntary territorial allocations between electric utilities have been condemned as *per se* antitrust violations despite the assumed natural monopoly character of the industry.[80]

A mistaken belief that electric utilities are natural monopolies has a tendency to make regulators and courts insensitive to anti-competitive acts of electric utilities. Further, antitrust standards more stringent than would be applied if no natural monopoly were assumed may be imposed. Thus, a court may conclude that market share is not evidence of monopoly power or that predatory acts must be shown in addition to monopoly power.[81]

It has been shown that competition is possible at both the production and distribution levels of the electric utility industry, and that competition may be expected to provide substantial benefits which cannot be provided by regulation. Without a conclusive showing that a particular utility is a natural monopoly in a specific market, there is no reason to anticipate that economic benefits will accrue from permitting a monopoly. Furthermore, even upon a showing of natural monopoly, changes in technology may remove the natural monopoly situation.

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76. Pennsylvania Water & Power Co. v. FPC, 193 F.2d 230 (D.C. Cir. 1951).

77. Northern Natural Gas Co. v. FPC, 399 F.2d 953 (D.C. Cir. 1968).

78. Toledo Edison Co., 5 NRC 133, *aff'd* 10 NRC 265 (1979).

79. Hjelmfelt, *Exclusive Service Territories, Power Pooling, and Electric Utility Regulations*, 38 FED. B. J. 21 (1979). Certification of service territories does not always end all competition. For example, Utah Power & Light Co. was permitted to serve a mine located in Empire Electric Association's certified territory because the mine was located closer to existing facilities of Utah Power & Light Co. Empire Elec. Ass'n v. Public Serv. Comm'n, 604 P.2d 930 (Utah 1979). *Contra* Sende Vista Water Co. v. City of Phoenix, 127 Ariz. 42, 617 P.2d 1158 (1980).

80. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Pennsylvania Water & Power Co. v. Consolidated Gas, Elec., Light & Power Co., 184 F.2d 552 (4th Cir. 1950).

81. Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

VI. PROPOSALS FOR REGULATORY CHANGES

The first and most obvious regulatory change necessary, once electric utilities are recognized not to be natural monopolies, is the repeal of territorial legislation. The disappearance of territorial legislation will not bring about an explosion of retail competition, given the industry's deep-seated bias against direct competition. Rather, competition can be anticipated to continue to be impeded by unspoken gentlemen's agreements between neighboring utilities. Nevertheless, even without a substantial increase in direct competition, the elimination of territorial laws will create a potential for competition, which may produce many of the benefits that could be expected from direct competition.

Second, utilities owning transmission facilities should be compelled to make them available at reasonable cost on a space-available basis to any utility desiring to use them. For a number of economic and environmental reasons, the duplication of transmission facilities at present is frequently unfeasible. At the same time, competition at wholesale for bulk power supplies is not possible without the ability to "wheel" the power over a third party's transmission system.[82] Long-term, all-requirements contracts should be carefully reviewed to determine whether the alleged benefits of assured bulk power supply and greater ease of financing large generating facilities actually exist and outweigh the impediment to competition.

A third and more fundamental need is for legislators, regulators, and courts to recognize that regulation is not a substitute for competition, but rather is an adjunct to competition. For the present, regulation is necessary because in most instances no more than two or three utilities will compete in any given market. Competition between so few utilities—oligopolistic competition—will not produce results equal to competition by many firms. Nevertheless, every effort should be made to increase competition at both the wholesale and retail levels.

An increase in wholesale competition may be required before retail competition will substantially increase. Far too often the potential retail competitor is dependent upon its retail rival for its source of supply. This creates a price squeeze potential that has not been eliminated despite the Supreme Court's ruling in *FPC v. Conway Corp.*[83] that the Commission must consider price squeeze issues in considering wholesale rates. To date, the Commission's exercise of its price squeeze authority has been disappointing,[84] and the courts have been split as to their authority to grant relief in price squeeze situations.[85]

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82. After obtaining wheeling rights, the municipal electric system in Cleveland, Ohio, was able to purchase bulk power from two additional suppliers. It is now purchasing at wholesale from three different suppliers.

83. 426 U.S. 271 (1976).

84. Hjelmfelt, *A Price Squeeze Theory for Implementation of* Federal Power Commission v. Conway Corp., 50 U. COLO. L. REV. 459 (1979); *Report of the Committee on Antitrust*, 1 ENERGY L. J. 107 (1980); *compare* City of Bethany v. FERC, Docket No. 80-1633 (D.C. Ct. App. 1981).

85. *Compare* City of Mishawaka v. American Elec. Power Co., 616 F.2d 976 (7th Cir. 1980) (damages were awarded) *with* City of Newark v. Delmarva Power & Light Co., 467 F. Supp. 763 (D. Del. 1979) (antitrust damages not available).

VII. CONCLUSION

In 1972, Richard Hellman wrote that the only successful regulation of electric utilities has been government competition and competitive interaction.[86] He concluded that the theory of natural monopoly, and the related theory that regulation by state commissions provides a legal substitute for competition, are incompatible with the facts. Based upon his case studies, he found that: "[U]tility managements, when exposed to government competition, have lowered prices and gained sales. More crucially, their finances have met the regulatory test of attracting capital for expansion. In a number of cases, rates of return have risen and exceeded those of comparable companies not under competition."[87]

The years since Hellman's study was published have confirmed his conclusions. However, there is no reason to limit competition to a struggle for customers between investor-owned and publicly-owned utilities. All utilities should be compelled to compete. Competition is not only practicable, but it promises to provide benefits not obtainable from regulation alone.

86. R. HELLMAN, GOVERNMENT COMPETITION IN THE ELECTRIC UTILITY INDUSTRY: A THEORETICAL AND EMPIRICAL STUDY 70 (1972).

87. *Id.* at 228.

FEDERAL ELECTION COMMISSION V. MACHINISTS NON-PARTISAN POLITICAL LEAGUE: DRAFT-CANDIDATE COMMITTEES ESCAPE GRASP OF FEDERAL ELECTION COMMISSION

JONATHAN N. MASLIN*

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INTRODUCTION

Private financing of federal election campaigns by individuals, interest groups, and business entities is a fundamental characteristic of American electioneering. Candidates depend on the receipt of financial contributions to supply the resources required to direct an effective campaign.[1] Accompanying this reliance on large contributions is the danger that such contributions "are given to secure a political *quid pro quo* from current and potential office holders."[2] This ever-present risk of political corruption erodes the in-

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1. "The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy." Buckley v. Valeo, 424 U.S. 1, 26 (1976). Out of the $81.65 million raised by the five leading candidates in the 1980 Presidential race, $80.05 million was spent. This illustrates the candidates' heavy dependence on their ability to raise money. Wash. Post, Nov. 16, 1981, at A3, col. 1.

2. Buckley v. Valeo, 424 U.S. 1, 26 (1976).

tegrity of the American electoral process.[3] To combat these infirmities, Congress passed the Federal Election Campaign Act of 1971 (FECA or Act).[4] Since 1971, Congress has amended the Act three times[5] due to various constitutional violations, ambiguities in statutory interpretation, and enforcement difficulties.

The FECA's major purpose is to limit "the actuality and appearance of corruption resulting from large individual financial contributions."[6] One manner of achieving this goal is the requirement that candidates, their political committees, and independent contributors file disclosure statements[7] with the Federal Election Commission (FEC or Commission).[8] Such reporting requirements serve a dual purpose. First, they furnish the voter with information on the source of a given candidate's funds, as well as how he spends these funds. Second, public access to a candidate's financial record serves as a deterrent to political *quid pro quo*. Furthermore, the purpose of the Act is enhanced by provisions that limit the amount that an individual or group may contribute.[9] There are essentially two ways to finance a campaign privately. Supporters of a candidate can either make direct *expenditures* for the candidate's benefit, or they can make *contributions* to others (such as the candidate himself or his committees), who then spend the money for the candidate's benefit. Contributions, but not expenditures, by individuals and non-party political committees are limited by the Act.[10]

The various amendments to the FECA have not fully resolved the difficulties and uncertainties that have hampered the enforcement of its regulatory scheme. The 1980 Presidential and Congressional elections produced

3. Public awareness of political honesty is especially acute in the aftermath of the Watergate scandal. *Id.* at 27. *See also* Buckley v. Valeo, 519 F.2d 821, 838-40 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976) (extensive discussion of corruption in campaign financing).

4. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-56 (1976 & Supp. IV 1980) and in various sections of 18, 47 U.S.C.).

5. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475; Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980) (codified at 2 U.S.C. §§ 431-56 (1976 & Supp. IV 1980) and in various sections of 18, 26, 47 U.S.C.).

6. Buckley v. Valeo, 424 U.S. 1, 26 (1976).

7. 2 U.S.C. §§ 432, 434 (Supp. IV 1980). This section of the Act requires candidates and their political committees to file detailed reports of their receipts and expenditures. 2 U.S.C. § 434(a) (Supp. IV 1980). Every person who is neither a candidate nor a political committee and who makes independent expenditures expressly advocating the election or defeat of a clearly identified candidate, in an aggregate amount in excess of $250 during a calendar year, shall file a statement with the Commission. 2 U.S.C. §§ 431(17), 434(c)(1) (Supp. IV 1980).

8. The enforcing body of the FECA is the Federal Election Commission. The Commission was established by the 1974 amendments. 2 U.S.C. § 437c (Supp. IV 1980). In addition to overseeing the entire regulatory scheme, the Commission may also recommend legislation, issue advisory opinions, subpoena witnesses and information for the furtherance of its investigations, and pursue both civil and criminal violations of the Act in the appropriate forum.

9. 2 U.S.C. §§ 441a-441b (1976 & Supp. IV 1980). *See infra* notes 117, 128-30 and accompanying text for a discussion of the contribution limits and their applicability to the note case.

10. The Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976), held that expenditure ceilings were unconstitutional. *See infra* notes 37-50 and accompanying text for a discussion of the *Buckley* decision. *But cf.* 2 U.S.C. § 441b(a) (1976), which prohibits electoral expenditures by corporations or labor organizations. This provision was not at issue in *Buckley*.

an overwhelming amount of litigation.[11] One of the more significant disputes arising from the 1980 elections posed the question of whether draft-candidate committees were subject to the jurisdiction of the FEC. A draft-candidate committee is a group whose intent and goal is to convince a candidate to enter an election campaign. Such a committee can support either a single candidate or multiple candidates. It seeks to achieve its goals through the raising and spending of money solicited from individuals, clubs, unions, political action committees, and anywhere else it can find people sympathetic to its cause. The most distinguishing feature of a draft committee is that it supports an *undeclared* candidate who has disavowed its support. In order for such a group to be subject to the FECA's contribution ceilings, it must be defined as a political committee under the Act.[12] Draft committees claim that they are not "political committees" and are, therefore, outside of the contribution ceilings imposed by the FECA. The FEC is of the opinion that draft committees are political committees and are thereby subject to the Act's reporting and contribution provisions. The Federal Election Campaign Act Amendments of 1979[13] brought draft committees within the reporting requirements of the Act. Thus, draft committees are now required to disclose their contribution and expenditure activities.[14] The amendment is silent, however, as to limits on the amount of contributions a draft committee can receive.

The District of Columbia Court of Appeals decision in *Federal Election Commission v. Machinists Non-Partisan Political League*[15] (*MNPL*) hinged upon interpretation of the term "political committee" and its application to draft committees. In *MNPL* the Carter-Mondale Campaign Committee, Inc. (Carter-Mondale) alleged that MNPL, a registered multi-candidate political committee, had violated the Act by making excessive contributions to draft committees espousing the candidacy of Senator Edward M. Kennedy.[16] MNPL argued that draft committees were not subject to the contribution limits of the Act, because they were not "political committees" under the

11. *See, e.g.*, California Medical Ass'n v. FEC, 453 U.S. 182 (1981); FEC v. Citizens for Democratic Alternatives in 1980, 655 F.2d 397 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981); FEC v. Machinists Non-Partisan Political League, 655 F.2d 380 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981); *In re* Carter-Mondale Reelection Comm., Inc., 642 F.2d 538 (D.C. Cir. 1980); FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45 (2d Cir. 1980); Bread Political Action Comm. v. FEC, 591 F.2d 29 (7th Cir. 1979); FEC v. Phillips Publishing, Inc., 517 F. Supp. 1308 (D.D.C. 1981); Common Cause v. Schmitt, 512 F. Supp. 489 (D.D.C. 1980), *aff'd per curiam*, 455 U.S. 129 (1982); Reader's Digest Ass'n v. FEC, 509 F. Supp. 1210 (S.D.N.Y. 1981); FEC v. Florida for Kennedy Comm., 492 F. Supp. 587 (S.D. Fla. 1980), *rev'd*, 681 F.2d 1281 (11th Cir. 1982); Common Cause v. FEC, 489 F. Supp. 738 (D.D.C. 1980); Republican Nat'l Comm. v. FEC, 487 F. Supp. 280 (S.D.N.Y.), *aff'd summarily*, 445 U.S. 955 (1980).

12. 2 U.S.C. § 441a(a) (1976). *See infra* notes 47-60 and accompanying text for a discussion of the definition given to political committees.

13. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980) (codified at 2 U.S.C. §§ 431-56 (Supp. IV 1980) and in various sections of 18, 26, 47 U.S.C.).

14. H.R. REP. NO. 422, 96th Cong., 1st Sess. 15, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 2860, 2874. *See* 2 U.S.C. § 434(a)(1) (Supp. IV 1980).

15. 655 F.2d 380 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981). The court did not incorporate the 1980 amendments of the FECA into its decision as the facts of *MNPL* transpired before the amendment became operative.

16. *Id.* at 383. *See infra* notes 126-31 and accompanying text.

term's definition in the FECA.[17] The FEC asserted that it did have jurisdiction over draft-candidate committees. The Commission issued a sweeping subpoena to further its investigation of the violations alleged in the Carter-Mondale complaint.[18] MNPL, maintaining its position that draft committees were not covered by the Act's provisions, refused to comply with the subpoena.[19] The FEC then filed a petition in the district court to enforce the subpoena.[20] MNPL appealed after the district court ordered compliance with the FEC subpoena.

Prior courts had refused to decide the jurisdiction question, declaring it improper to raise jurisdictional issues in an action to enforce the Commission's subpoena.[21] These courts held that subpoena enforcement proceedings were of a limited nature, and thus, were not to extend beyond the enforcement issue. In *MNPL*, the District of Columbia Court of Appeals reached a contrary result, holding that the FEC's subpoena and investigation exceeded the Commission's subject matter jurisdiction, and therefore vacated the lower court's enforcement order.[22]

This article discusses and analyzes the significance of the court's decision in this novel area. The history of the FECA is presented, particularly regarding its relationship with draft committees. The issues of agency subpoena enforcement and the first amendment right of political association are also fully detailed. The article concludes by scrutinizing the ramifications of the court's unprecedented decision and the resulting loophole created in the FECA.

I. PRIOR LEGAL HISTORY

The following discussion will review federal election law, necessary to an understanding of *MNPL*, and will present an overview of draft committees and their treatment under the FECA. An examination of a federal agency's power to investigate, and to issue and enforce subpoenas is also

17. *See infra* note 117.

18. 655 F.2d at 384. The Commission's power to issue and request enforcement of subpoenas is provided in 2 U.S.C. § 437d (Supp. IV 1980). *See infra* notes 132-37 and accompanying text.

19. 655 F.2d at 384.

20. *Id. See* 2 U.S.C. § 437d(b) (Supp. IV 1980).

21. *See* FEC v. Florida for Kennedy Comm., 492 F. Supp. 587 (S.D. Fla. 1980), *rev'd*, 681 F.2d 1281 (11th Cir. 1982) (although the court found some support for the proposition that a draft committee is not a political committee, and therefore not within the scope of the FECA, the court held that the issue of the Act's "coverage" could not be decided at the subpoena enforcement stage). *But see* FEC v. Wisconsin Democrats for Change in 1980, Order No. 80-C-124 (W.D. Wisc. Apr. 24, 1980) (the district court found that subject matter jurisdiction did exist and thus the subpoena was within the Commission's authority). *See infra* notes 61-66 and accompanying text for a discussion of these two draft Kennedy cases. *See also* United States v. Morton Salt Co., 338 U.S. 632 (1950) (administrative subpoenas may be broad in nature); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (purpose of subpoena is to procure evidence, not to prove a charge); Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943) (issue of coverage of the Act was not for the district court, but for the Secretary of Labor to decide). *See infra* notes 78-100 and accompanying text for a discussion of agency subpoena enforcement.

22. 655 F.2d at 382.

presented. Finally, the impact of the first amendment right of political association as it relates to compelled disclosure of information will be discussed.

A. *The History of the FECA*

The Constitution expressly grants Congress the power to regulate the elections of members of the House of Representatives and Senate.[23] The Supreme Court has acknowledged that "the function contemplated by Article I, section 4, is that of making laws."[24] Congress broad power to regulate Presidential and Vice-Presidential elections is also recognized by the Court.[25]

A traditional concern in American politics is the prevention of corruption in elections.[26] Congress has attempted to prevent such abuses by enacting reporting and disclosure requirements. The seminal federal disclosure law, the Act of June 25, 1910,[27] required committees that influenced congressional elections in two or more states to report all expenditures and contributions, as well as the identity of the recipients or contributors of those funds. It further required a person to report his expenditures if he spent more than $50 in a year for the purpose of influencing a congressional election in more than one state and if the expenditure was not made through a political committee.[28] The Federal Corrupt Practices Act of 1925 considerably broadened the disclosure requirements.[29] Congress again maintained that corruption was the justification for requiring the disclosure of the political activities of individuals.[30] Political committees were defined as organizations "which [accept] contributions or [make] expenditures for the purpose of influencing or attempting to influence the election of candidates or presidential and vice-presidential electors (1) in two or more States, or (2) . . . [as

23. U.S. CONST. art. I, § 4, cl. 1, provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

24. Smiley v. Holm, 285 U.S. 355, 366 (1931). In *Smiley*, the Court stated that among the functions Congress has in regulating elections is the "prevention of fraud and corrupt practices." *Id.* This is the precise compelling interest that justified the contribution limitations in Buckley v. Valeo, 424 U.S. 1 (1976). *See Ex parte* Yarbrough, 110 U.S. 651, 661 (1884) (Congress has wide supervisory role over entire range of election law).

25. "The power of Congress to protect the election of President and Vice-President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgement of Congress." Burroughs v. United States, 290 U.S. 534, 547 (1934). *See also* Buckley v. Valeo, 424 U.S. 1, 85-109 (1976); Oregon v. Mitchell, 400 U.S. 112 (1970) (Congress has authority to change voting age in federal elections).

26. *See, e.g.*, FEC v. MNPL, 655 F.2d 380, 388-89 n.17 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981).

27. Act of June 25, 1910, ch. 392, 36 Stat. 822 (1910). For a general discussion of history of federal election disclosure law, see Buckley v. Valeo, 424 U.S. 1, 61-62 (1976); United States v. UAW, 352 U.S. 567 (1957). *See also* Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U. L. REV. 900 (1971).

28. Act of June 25, 1910, ch. 392, 36 Stat. 822, 822-24 (1910).

29. Federal Corrupt Practices Act of 1925, ch. 368, tit. III, 43 Stat. 1070 (1925) (current version at 2 U.S.C. § 441b (1976 & Supp. IV 1980)). Although the FECA of 1971 repealed the Federal Corrupt Practices Act of 1925, many provisions of the Corrupt Practices Act were incorporated into the FECA.

30. *See* 65 CONG. REC. 9507-08 (1924) (statements of Sen. Robinson).

a] subsidiary of a national committee."[31] The committees were required to report total contributions and expenditures, including the names and addresses of each person who contributed $100 or more or who received $10 or more in a calendar year.[32] In *Burroughs v. United States*,[33] the Supreme Court upheld the Corrupt Practices Act stating that Congress had the "power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result . . . ."[34]

The next major piece of legislation was the Federal Election Campaign Act of 1971.[35] The FECA has been amended three times since its inception.[36] The most rigorous changes occurred pursuant to the 1976 Supreme Court decision in *Buckley v. Valeo*.[37] Because *Buckley* is the source of authority in most federal election litigation,[38] a brief examination of the opinion is appropriate.[39]

Generally, the Court in *Buckley* struck down the FECA's expenditure limitations but upheld the Act's contribution ceilings and disclosure requirements.[40] The Court used an "exacting" level of scrutiny to provide the broadest protection for the first amendment rights of free political expression and association.[41] The Court stated that expenditure limits "reduce[d] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money."[42] By contrast, a limit on the amount of a contribution "entails only a marginal restriction upon the contributor's ability to engage in free communication . . . . [I]t permits the

31. Federal Corrupt Practices Act of 1925, ch. 368, § 302(c), 43 Stat. 1070, 1070 (1925).

32. *Id.* at § 305.

33. 290 U.S. 534 (1934).

34. *Id.* at 545. *See* Birnbaum, *The Constitutionality Of The Federal Corrupt Practices Act After* First National Bank of Boston v. Bellotti, 28 AM. U.L. REV. 149 (1979) (overall discussion of the Federal Corrupt Practices Act, its effectiveness and constitutionality, with emphasis on the Act's effect on corporate political activity).

35. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-56 (1976 & Supp. IV 1980) and in various sections of 18, 26, 47 U.S.C.).

36. *See supra* note 5.

37. 424 U.S. 1 (1976).

38. *See, e.g.*, California Medical Ass'n v. FEC, 453 U.S. 182 (1981); FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45 (2d Cir. 1980); Common Cause v. Schmitt, 512 F. Supp. 489 (D.D.C. 1980), *aff'd per curiam*, 455 U.S. 129 (1982).

39. *See generally* Clagett & Bolton, Buckley v. Valeo, *Its Aftermath, And Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 VAND. L. REV. 1327 (1976); Nicholson, Buckley v. Valeo: *The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WIS. L. REV. 323 (1977); Comment, Buckley v. Valeo: *The Supreme Court and Federal Campaign Reform*, 76 COLUM. L. REV. 852 (1976).

40. *See supra* text accompanying note 10. The suit in *Buckley* was brought by various candidates, incumbent officials who sought re-election, potential contributors, political committees, and numerous party organizations. 424 U.S. at 7-8. The complaint sought an injunction against enforcement of the major provisions of the Act, as well as a declaratory judgment that its provisions were unconstitutional. *Id.* at 8-9. The appellants claimed that a limitation on the "use of money for political purposes constitute[d] a restriction on communication violative of the First Amendment," since money is essential for effective political communication. *Id.* at 11. Additionally, the appellants argued that the disclosure and reporting requirements of the Act "unconstitutionally impinged on their right to freedom of association." *Id.*

41. *Id.* at 16.

42. *Id.* at 19.

symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues."[43] Thus, although both ceilings affect first amendment rights, the contribution limitations do not encroach as seriously upon protected political expression or association.[44]

The Act's primary purpose, limiting "the actuality and appearance of corruption resulting from large individual financial contributions," was enough to justify contribution limits.[45] The corruption justification was insufficient, however, to permit expenditure ceilings, since the Court felt that the danger of corruption through unlimited expenditure was minimal.[46]

The language of the Act[47] appears to incorporate as political committees a nearly unlimited range of issue-oriented groups.[48] The Court in *Buckley*, however, recognizing the dangers of a broad definition, sharply limited the scope of the term "political committee."

To fulfill the purposes of the Act [the definition of political com-

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43. *Id.* at 20-21.

44. *Id.* at 23. The contribution ceilings still permit the joint participation of individuals to form independent political committees (such as MNPL). Such committees, through the combined efforts of individual contributions, have the ability to exert substantial political influence. *Id.* at 28 n.31.

45. *Id.* at 26. The Court found it unnecessary to consider two other proposed justifications for the contribution limitations—neutralizing the voices of affluent groups and persons, and reducing the skyrocketing costs of election campaigns. *Id.* at 25-26.

46. *Id.* at 46-47. "While the independent expenditure ceiling fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression." *Id.* at 47-48.

The Court also disposed of the argument that the removal of the expenditure limits would hamper the overall regulatory scheme by pointing out that expenditures "controlled by or coordinated with" the candidate or his campaign are treated as contributions under the Act and, as such, are subject to the contribution limits. *Id.* at 46-47.

47. The relevant terms of the Act at the time of the litigation are defined below. Although these provisions have since been amended, the changes would not affect the outcome of the issues discussed here.

> "[P]olitical committee" means any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000;
>
> "[C]ontribution"—
>
> (1) means a gift, subscription, loan, advance, or deposit of money or anything of value *made for the purpose of*—
>
> (A) *influencing the nomination for election*, or election, of any person to Federal office . . . , or
>
> (B) influencing the result of an election held for the expression of a preference for the nomination of persons for election to the office of President of the United States. . . .
>
> "[E]xpenditure"—
>
> (1) means a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, *made for the purpose of*—
>
> (A) *influencing the nomination for election*, or the election, of any persons to Federal office . . . , or
>
> (B) influencing the results of a primary election. . . .

2 U.S.C. § 431(d), (e), (f) (1976) (amended 1980) (emphasis added).

48. In United States v. National Comm. for Impeachment, 469 F.2d 1135 (2d Cir. 1972), the court expressed its fears that a liberal interpretation of the Act's provisions would discourage many groups from organizing and expressing their viewpoints. Under this liberal interpretation "every little Audubon Society chapter would be a 'political committee,' for 'environment' . . . . [A] Boy Scout troop advertising for membership to combat 'juvenile delinquency' or a Golden Age Club promoting 'senior citizens' rights' would fall under the Act." *Id.* at 1142. *See infra* note 51 and accompanying text.

> mittees] need *only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate*. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.[49]

The Court in *Buckley* believed that a less restrictive definition would be "impermissibly broad."[50]

In reaching this definition, the Court relied on two lower court decisions.[51] In *United States v. National Committee for Impeachment*,[52] the Committee published an advertisement, five months before the Presidential election, calling for the impeachment of President Nixon because of his Vietnam policies. The advertisement declared that the Committee would support any candidate for election to the House of Representatives who would back the impeachment drive.[53] The government asserted that the Committee was a political committee, since it was trying to influence the outcome of the Presidential election through the advertisement and the contributions requested. The Second Circuit interpreted the Act's language "made for the purpose of influencing"[54] "to mean an expenditure made with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate or his agents."[55] The court also "construe[d] the Act to apply only to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates."[56] The court, therefore, held the Committee to be outside of the narrow definition of political committee.[57]

The *National Committee for Impeachment* interpretation of political committee was followed in *ACLU v. Jennings*,[58] where an advertisement was published which deprecated President Nixon's position on busing.[59] The court in *Jennings* was in "full agreement" with the *National Committee for Impeachment* interpretation, because it successfully circumvented potential first amendment infirmities in the Act.[60]

Regulation of federal elections has been reshaped frequently. The FECA has undergone these changes through congressional amendments and judicial interpretations. The term "political committee" is one term that the

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49. 424 U.S. at 79 (emphasis added).

50. *Id.* at 79-80.

51. United States v. National Comm. for Impeachment, 469 F.2d 1135 (2d Cir. 1972); ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom.*, Staats v. ACLU, 422 U.S. 1030 (1975).

52. 469 F.2d 1135 (2d Cir. 1972).

53. *Id.* at 1136-38.

54. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 301(e), (f), 86 Stat. 3, 11-12 (1972) (current version at 2 U.S.C. § 431(8), (9) (Supp. IV 1980)).

55. 469 F.2d at 1141.

56. *Id.* The court declared that the government's construction of the Act was incompatible with the first amendment right to free expression. *Id.* at 1142.

57. *Id.* at 1140-41.

58. 366 F. Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom.*, Staats v. ACLU, 422 U.S. 1030 (1975).

59. 366 F. Supp. at 1042-44.

60. *Id.* at 1057.

courts have construed. The Supreme Court's narrow definition of political committees in *Buckley* restricts the scope of groups and committees that are subject to regulation under FECA.

B. *Draft-Candidate Committees*

Draft-candidate committees have only recently become a conspicuous factor in the campaign process. Due to their brief history, draft committees had been the subject of litigation on only two prior occasions at the time of the *MNPL* decision.[61] These cases entailed an unprecedented assertion by the FEC of subject matter jurisdiction over draft committees for the purpose of enforcing subpoenas. Both involved draft committees which were attempting to convince Senator Edward M. Kennedy to enter the 1980 Presidential campaign.

In *FEC v. Florida for Kennedy Committee* (*FFKC*),[62] the district court implied the FEC probably lacked subject matter jurisdiction over draft committees.[63] Nonetheless, the court held it was precluded from considering the issue of subject matter jurisdiction in a subpoena enforcement proceeding.[64] In *FEC v. Wisconsin Democrats for Change in 1980*,[65] the court addressed the issue of coverage, and found that "on its face" the subject matter of the subpoena was within the agency's authority and therefore enforceable.[66] Because no court has directly addressed the issue of FEC jurisdiction over draft groups, examination of prior draft-candidate cases does not aid in determining whether the FEC has such jurisdiction.

Legislative activity provides more aid in ascertaining whether Congress intended the Act to cover draft committees. The Act itself is devoid of any explicit draft committee language. Additionally, no mention of draft committees existed in the Act's legislative history until consideration of the 1980 amendments.[67] Congressional discussion of contribution and expenditure ceilings for political committees consistently refers to these limitations as they relate to the campaign of a particular candidate.[68] The absence of any

61. FEC v. Florida for Kennedy Comm., 492 F. Supp. 587 (S.D. Fla. 1980), *rev'd*, 681 F.2d 1281 (11th Cir. 1982); FEC v. Wisconsin Democrats for Change in 1980, No. 80-C-124 (W.D. Wisc. Apr. 24, 1980). Both cases involved committees named in the Carter-Mondale complaint issued to MNPL.

62. 492 F. Supp. 587 (S.D. Fla. 1980), *rev'd*, 681 F.2d 1281 (11th Cir. 1982). The reversal in this case was handed down on Aug. 2, 1982. In reaching its conclusion that the FEC had no jurisdiction to investigate the FFKC, the Eleventh Circuit relied heavily on *MNPL*, indicating "substantial" agreement with that opinion. 681 F.2d at 1282.

63. The district court believed judicial authority generally supported the proposition that the term "political committee" is limited to a group whose major purpose is the nomination or election of a candidate. 492 F. Supp. at 595 & n.12 (citing Buckley v. Valeo, 424 U.S. 1, 79 (1976); United States v. National Comm. for Impeachment, 469 F.2d 1135, 1141 (2d Cir. 1972); ACLU v. Jennings, 366 F. Supp. 1041, 1057 (D.D.C. 1973)).

64. The *FFKC* court cited as its authority Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). Under *Oklahoma Press*, statutory coverage does not have to be demonstrated before an investigation can proceed.

65. No. 80-C-124 (W.D. Wisc. Apr. 24, 1980).

66. *Id.*, slip op. at 4-5.

67. *See infra* notes 76-77 and accompanying text.

68. *See* H.R. REP. NO. 1057, 94th Cong., 2d Sess. 57-58 (1976). *See also* H.R. REP. NO. 1239, 93d Cong., 2d Sess. 7 (1974) (limits applicable only to expenditures related to a "clearly

discussion of draft committees by Congress suggests it did not intend that the Act cover draft committees.

The FEC itself sheds more light on the FECA's coverage of draft committees. Through advisory opinions[69] the Commission is able to render its views on a number of issues. The FEC has sought to bring draft committees within the definition of political committee. Advisory Opinion 1979-26 contains the initial response to pre-candidacy activities.[70] The Commission stated that an individual should be able to "test the waters" to determine the feasibility of possible candidacy without being subject to contribution limitations. Exploratory groups, formed for that purpose, therefore, were not political committees. The Commission also stated, however, that a candidate could not amass campaign funds through these means before declaring candidacy; rather, funds contributed were available only to ascertain political support for a potential candidacy through activities such as polling.[71]

In Advisory Opinion 1979-40,[72] the Florida for Kennedy Committee (FFKC) requested an opinion regarding the applicability of the Act's contribution and expenditure limits. Although the Commission found that Senator Kennedy was not a candidate, it nevertheless held the FFKC subject to the Act's provisions, thereby limiting the amount a person or political committee could contribute to FFKC to $5000.[73]

The Commission, in its annual reports, has repeatedly suggested that draft committees be incorporated into the political committee definition.[74] The annual report is submitted to Congress and contains the Commission's legislative recommendations. Since 1975, the FEC has recommended that Congress make both the reporting and contribution provisions applicable to draft groups.[75] The extensive amendments in 1976 did not affect draft committees. In 1980, however, in response to the Commission's continued urging, Congress made the Act's reporting provisions applicable to draft groups.[76] The 1980 amendments did not deal with contribution ceilings for

identified candidate"); S. REP. NO. 229, 92d Cong., 1st Sess. 124 (1971) (reporting requirements would be required by "every [political] committee supporting a candidate.") (supplemental views of Senators Prouty, Cooper, and Scott).

69. 2 U.S.C. § 437f (Supp. IV 1982); 11 C.F.R. § 112 (1982) (authorizes the Commission to issue advisory opinions). An advisory opinion is an interpretation of the law without any binding legal affect. It is issued by the Commission upon the request of an interested party.

70. FEC Advisory Opinion 1979-26, 1 FED. ELECTION CAMP. FIN. GUIDE (CCH) ¶ 5408 (June 18, 1979). Rep. Grassley of Iowa questioned whether "exploratory committees," whose purpose was to determine the viability of becoming a candidate, were subject to contribution limits.

71. *Id.* at 2. It can be said that a draft committee, like an exploratory committee, attempts to "feel out" the public and convince a candidate to run by showing him the extent of his public support. Both groups deal solely with the pre-candidacy stage.

72. FEC Advisory Opinion 1979-40, 1 FED. ELECTION CAMP. FIN. GUIDE (CCH) ¶ 5425 (Aug. 17, 1979).

73. *See* 2 U.S.C. § 441a(a)(1)(C), (a)(2)(C) (1976). *See also* FEC Advisory Opinion 1979-49, 1 FED. ELECTION CAMP. FIN. GUIDE (CCH) ¶ 5433 (Oct. 5, 1979) (Commission affirmed Advisory Opinion 1979-40).

74. *See* 1975-1980 FEC ANN. REP.

75. Brief in Opposition of Machinists Non-Partisan Political League, Respondent at 15-16, FEC v. MNPL, 454 U.S. 897 (1981) (cert. denied).

76. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 104, 93 Stat. 1339, 1348 (1980) (codified at 2 U.S.C. § 434 (Supp. IV 1980)). "The change was made to

draft groups in any way. Most recently, the Commission has submitted a legislative recommendation which would require draft groups to comply with the contribution and expenditure provisions of the Act in the same fashion as political committees.[77]

The recent development of draft committees has coincided with efforts by the Commission to stunt the growth of these committees. As draft groups have become more influential, the FEC has increasingly sought jurisdiction over them. Congress thus far has refused to comply fully with the Commission's request. The legislature has had ample opportunity to incorporate draft groups into the Act but has done so in only a limited manner. Congressional silence, prior to 1980, should not be construed as an intention to incorporate draft committees in the Act.

C. *Federal Agency Power of Investigation and Subpoena Enforcement*

When conducting investigations into possible violations of the law, many federal agencies have the authority to subpoena information for the purpose of aiding their inquiry.[78] The FECA authorizes the FEC to issue subpoenas[79] and permits the Commission to seek enforcement through the district court if the subpoenaed party refuses to comply.[80] These subpoenas may compel disclosure of various records, documents, and membership lists, all of which tend to be of a personal nature.[81] Such disclosure may not be compelled, however, if it will chill the free exercise of political expression and association protected by the first amendment.[82] Before a subpoena is enforced, a district court must consider the extent to which it will require demonstration by the issuing agency of statutory jurisdiction over the subject matter of the investigation. It is in this context that subpoena enforcement requests are examined.

Agencies involved in regulating corporate and business matters have initiated most subpoena enforcement litigation. In these areas, the Supreme Court has granted wide deference to agency requests. The Court's decision

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ensure that organizations set up to 'draft' individuals who are not actually candidates will be required to report." H.R. REP. NO. 96-422, 96th Cong., 1st Sess. 15, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 2860, 2874. These amendments became effective after the draft-Kennedy activities and are therefore inapplicable in *MNPL*.

77. Letter from Mr. John McGarry, Chairman of the FEC, to Mr. Charles Mathias, Chairman of the Senate Committee on Rules and Administration (Aug. 21, 1981). The proposal would amend the Act to cover contributions and expenditures made "for the purpose of influencing a clearly identified individual to *seek* nomination for election. . . ." *Id.* (emphasis added).

78. *See, e.g.*, Federal Trade Commission, 15 U.S.C. § 49 (1976); Securities and Exchange Commission, 15 U.S.C. § 78u (1976); Internal Revenue Service, 26 U.S.C. § 7602 (1976); Fair Labor Standards Act, 29 U.S.C. § 209 (1976).

79. 2 U.S.C. § 437d(a)(3), (4) (Supp. IV 1980).

80. 2 U.S.C. § 437d(b) (Supp. IV 1980).

81. For contents of requested subpoena in *MNPL*, see *infra* note 135 and accompanying text.

82. *See* Bates v. City of Little Rock, 361 U.S. 516, 523 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958); Sweezy v. New Hampshire, 354 U.S. 234, 245 (1957). *See infra* notes 101-12 and accompanying text for discussion of first amendment protections from compelled disclosure.

in *United States v. Morton Salt Co.*[83] furnished the test used to ascertain the viability of a requested subpoena. This test is designed to narrow the issues that may be litigated at a subpoena enforcement proceeding to whether the agency has the *statutory authority* to undertake the investigation and obtain the information sought. The subpoena is enforceable if "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."[84] The utilization of the *Morton Salt* test usually results in a district court's "rubber stamp" enforcement of the subpoena.[85]

In addition, during subpoena enforcement proceedings, most courts refuse to consider jurisdictional or substantive defenses which might be raised against an administrative complaint.[86] These courts believe that to do otherwise would severely hamper agency investigations. This rationale has been applied to FEC investigations as well. The Fifth Circuit, in *Federal Election Commission v. Lance*,[87] explicitly adopted the *Morton Salt* framework in rejecting challenges to an FEC subpoena during an enforcement proceeding.[88] In *FEC v. Florida for Kennedy Committee*,[89] an FEC subpoena of a draft-

83. 338 U.S. 632 (1950). In *Morton Salt*, the Federal Trade Commission (FTC) had required various corporations to file reports demonstrating whether they had complied with a lower court's cease and desist order, as well as with other FTC regulations. *Id.* at 634. Morton Salt, along with the other respondents, objected to the FTC's jurisdiction and subsequently declined to supply the information demanded. *Id.* at 637. In formulating the test the Court relied heavily on Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208 (1946). *See also* Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943). (subpoena issued by Secretary of Labor should be enforced unless information sought was "plainly incompetent or irrelevant to any lawful purpose of the Secretary . . . ." *Id.* at 509).

For a general overview of the history of federal agency subpoena enforcement litigation see 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4 (2d ed. 1978).

84. 338 U.S. at 652. *See* United States v. Powell, 379 U.S. 48, 57 (1964) (subpoena must have legitimate purpose and must be relevant to that purpose); FEC v. Lance, 617 F.2d 365 (5th Cir. 1980) (court's role in subpoena enforcement proceeding is a limited one), *aff'd in part, rev'd in part on other grounds*, 635 F.2d 1132 (5th Cir.) (en banc), *cert. denied*, 453 U.S. 917 (1981). *See also* SEC v. Arthur Young & Co., 584 F.2d 1018, 1024 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979); FTC v. Texaco, Inc., 555 F.2d 862, 873 (D.C. Cir.) (en banc), *cert. denied*, 431 U.S. 974 (1977); Federal Maritime Comm'n v. Port of Seattle, 521 F.2d 431, 434-35 (9th Cir. 1975); SEC v. Savage, 513 F.2d 188, 189 (7th Cir. 1975); SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047, 1052-53 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); Adams v. FTC, 296 F.2d 861, 866 (8th Cir. 1961), *cert. denied*, 369 U.S. 864 (1962).

85. *See, e.g.*, FTC v. Carter, 636 F.2d 781, 785-87 (D.C. Cir. 1980); FTC v. Owens-Corning Fiberglas Corp., 626 F.2d 966, 974 (D.C. Cir. 1980); SEC v. Arthur Young & Co., 584 F.2d 1018, 1023-24, 1032-33 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979). *But see, e.g.*, CAB v. United Airlines, Inc., 542 F.2d 394 (7th Cir. 1976); Montship Lines, Ltd. v. Federal Maritime Bd., 295 F.2d 147 (D.C. Cir. 1961).

86. *See* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 213 (1946); Endicott Johnson Corp v. Perkins, 317 U.S. 501, 509 (1943); FEC v. Lance, 617 F.2d 365 (5th Cir. 1980), *aff'd in part, rev'd in part on other grounds*, 635 F.2d 1132 (5th Cir.) (en banc), *cert. denied*, 453 U.S. 917 (1981); FTC v. Texaco, Inc., 555 F.2d 862, 879 (D.C. Cir.) (en banc), *cert. denied*, 431 U.S. 974 (1977); Federal Maritime Comm'n v. Port of Seattle, 521 F.2d 431, 434-35 (9th Cir. 1975); SEC v. Savage, 513 F.2d 188, 189 (7th Cir. 1975); SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047, 1052-53 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); Adams v. FTC, 296 F.2d 861, 866 (8th Cir. 1961), *cert. denied*, 369 U.S. 864 (1962).

87. 617 F.2d 365 (5th Cir. 1980), *aff'd in part, rev'd in part on other grounds*, 635 F.2d 1132 (5th Cir.) (en banc), *cert. denied*, 453 U.S. 917 (1981).

88. 617 F.2d at 369. The court also cited Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), and Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943).

89. 492 F. Supp. 587 (S.D. Fla. 1980), *rev'd*, 681 F.2d 1281 (11th Cir. 1982). *See supra* notes 64-65 and accompanying text.

candidate committee was enforced by the district court without hearing coverage objections.

A number of cases place limits on judicial enforcement of subpoenas.[90] In *Oklahoma Press Publishing Co. v. Walling*,[91] a case consistently cited as supporting broad judicial subpoena enforcement, the Supreme Court concluded its discussion with restraining language.[92] The Court also recognized that many essential issues, ordinarily decided by an agency's administrator, should be carefully reviewed by the district court.[93] The district court "should not become a mere rubber stamp for the approval of arbitrary action by an administrative agency."[94] Opinions recognizing the limited judicial role in subpoena enforcement proceedings, preface their decisions with the assurance that the investigation is within the agency's jurisdiction.[95] Indeed, the *Morton Salt* test has been held subject to exceptions where a "patent lack of jurisdiction" is evident.[96]

These judicial limitations have been similarly applied to the investigatory authority of the FEC. In *Jones v. Unknown Agents of the FEC*,[97] the District of Columbia Circuit found the Commission's inquiry power to be broad but not limitless.[98] The court required that the Commission's investigation "bear some possible relation to [its] responsibilities under the Act."[99] These parameters apply not only to the FEC's statutory authority to undertake an investigation, but also to the scope of its examination.[100]

The *Morton Salt* test provides federal agencies, such as the FEC, with a means for obtaining enforcement of their subpoena demands. The test's insubstantial requirements, combined with the district court's refusal to permit

90. *See, e.g.*, United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); FTC v. Carter, 636 F.2d 781, 785-87 (D.C. Cir. 1980); FTC v. Owens-Corning Fiberglas Corp., 626 F.2d 966, 974 (D.C. Cir. 1980); Appeal of FTC Line of Business Report Litigation, 595 F.2d 685, 702-03 (D.C. Cir.), *cert. denied*, 439 U.S. 958 (1978); FTC v. Texaco, Inc., 555 F.2d 862, 872 (D.C. Cir.) (en banc), *cert. denied*, 431 U.S. 974 (1977).

91. 327 U.S. 186 (1946).

92. "Persons from whom [the administrator] seeks relevant information are not required to submit to his demand, *if in any respect it is unreasonable or overreaches the authority Congress has given*." *Id.* at 217 (emphasis added).

93. *Id.* at 216-17. "The issues of authority to conduct the investigation, relevancy of the materials sought and breadth of the demand are neither minor nor ministerial matters." *Id.* at 217 n.57.

94. *Id.* at 216 n.56 (quoting General Tobacco & Grocery Co. v. Fleming, 125 F.2d 596, 599 (6th Cir. 1942)).

95. These cases are in the business regulation context. *See, e.g.*, United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); FTC v. Carter, 636 F.2d 781, 785-87 (D.C. Cir. 1980); FTC v. Owens-Corning Fiberglas Corp., 626 F.2d 966, 974 (D.C. Cir. 1980); FTC v. Texaco, Inc., 555 F.2d 862, 872 (D.C. Cir.) (en banc), *cert. denied*, 431 U.S. 974 (1977).

96. CAB v. Deutsche Lufthansa Aktiengesellschaft, 591 F.2d 951 (D.C. Cir. 1979).

97. 613 F.2d 864 (D.C. Cir. 1979). Jones, a contributor to the campaign of a candidate under investigation, was questioned at his home by agents of the FEC. *Id.* at 868-69. Jones was questioned about various personal matters, including his political beliefs and affiliations. *Id.* The court held that the investigation itself was not objectionable, but that questions about political beliefs are unrelated to legitimate investigations and beyond the FEC's authority. *Id.* at 873.

98. *Id.* at 872.

99. *Id.*

100. *Id. Cf.* FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45 (2d Cir. 1980) (court refused to enforce provisions of FECA where Act's provisions were inapplicable to defendant's activities).

substantive defenses addressed to the merits of the agency's potential complaint, usually result in compulsory enforcement by the district court. This is especially true with subpoenas of a corporate or business nature where overbreadth of the subpoena is the only effective check placed upon an agency.

D. *First Amendment Rights of Political Association*

Once the district court has enforced an agency's subpoena, the subpoenaed party is required to disclose the requested information. Compelled disclosure itself can violate first amendment protections.[101] An essential function of the first amendment is to protect "free discussion of governmental affairs . . . including discussions of candidates."[102] The compelled disclosure of the activities of a political group, such as a draft-Kennedy committee, may violate this basic constitutional freedom.[103] The constitutional importance given to associational rights stems from the Court's recognition that group association unquestionably enhances the ability of individuals to express their point of view.[104] In order to protect this essential constitutional right, the Court has subjected forced disclosure requests, in the context of political association, to the closest scrutiny possible.[105] The inherent dangers of compelled disclosure are particularly acute in the context of political campaigns.[106]

To satisfy this intense level of scrutiny, the Supreme Court has demanded that the state's subordinating interest be compelling.[107] *Buckley* also requires that the government's interest must bear a "relevant correlation" or a "substantial relation" to the information being requested.[108] This strict

101. *See* Buckley v. Valeo, 424 U.S. 1, 64 (1976). *See also* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415, 431 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449 (1958).

102. Mills v. Alabama, 384 U.S. 214, 218 (1966). *See also* Roth v. United States, 354 U.S. 476, 484 (1957) (first amendment should assure uninhibited interchange of political and social ideas).

103. Bates v. City of Little Rock, 361 U.S. 516, 523 (1960); NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449, 462 (1958). Because of the political nature of an FEC investigation, liberal subpoena enforcement becomes distinctly more dangerous than the enforcement of other business-related agencies' subpoenas.

104. NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449, 460 (1958). The Court has most recently reiterated this point in Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981).

105. NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449, 460-61 (1958). *See also* Buckley v. Valeo, 424 U.S. 1, 64 (1976) ("exacting scrutiny").

106. The Court in Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971), explicitly declared that the first amendment constitutional guarantee has "its fullest and most urgent application precisely to the conduct of campaigns for political office."

107. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958). *See also* Buckley v. Valeo, 424 U.S. 1, 25 (1976); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring); Common Cause v. Schmitt, 512 F. Supp. 489 (D.D.C. 1980), *aff'd per curiam*, 455 U.S. 129 (1982).

108. 424 U.S. at 64; *see also* Gibson v. Florida Legislative Comm., 372 U.S. 539, 546 (1963); NAACP v. Button, 371 U.S. 415, 438 (1963); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449, 463 (1958).

Following *Buckley*, courts have consistently applied a strict level of scrutiny when construing election law regulation of freedom of association and expression. *See, e.g.*, First Nat'l Bank of

scrutiny test, first established in *NAACP v. Alabama ex rel* Patterson,[109] can be met by a showing of sufficiently important government interests.[110] The Court in *Buckley*, in fact, held that the FECA disclosure requirements successfully met this exacting level of scrutiny.[111] The Court, however, placed restrictions on its holding. To demonstrate a compelling state interest, the FEC must first show that the disclosing individual or group falls within the Act's jurisdiction.

As a consequence, in subpoena enforcement proceedings, the first amendment issue may be avoided by a statutory construction holding the FECA's reporting provisions were not intended to encompass the party requested to report. If the Act does not cover the individual or group in question, there is no need to inquire into first amendment violations; the Act is simply inapplicable. If the individual or group is within the jurisdiction of the FEC, a compelling interest for the subpoenaed information then must be shown. Circumstances may exist where the first amendment infringement is so great, and the state's interest in requiring disclosure so slight, that application of the Act's provisions could not pass constitutional muster.[112] The potentially "chilling effect" of a compelled disclosure on first amendment rights becomes a factor to be weighed by a court in construing the coverage of the Act in an FEC subpoena enforcement proceeding.

II. FACTS AND PROCEDURAL HISTORY OF *FEC v. MNPL*

A. *The Draft-Kennedy Committees' Activities Prior to Commencement of the Commission's Investigation*

The conflict in *MNPL* involved varying interpretations of the status of the draft-Kennedy committees under the FECA.[113] The MNPL was the separate segregated fund[114] of the International Association of Machinists

Boston v. Bellotti, 435 U.S. 765 (1978); Common Cause v. Schmitt, 512 F. Supp. 489 (D.D.C. 1980), *aff'd per curiam*, 455 U.S. 129 (1982).

109. 357 U.S. 449 (1958).

110. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 97 (1961) (the state's showing of sufficiently important government interests is especially significant where the "free functioning of our national institutions" is threatened).

111. 424 U.S. at 66-68. The Court found three categories that justified the Act's reporting requirements. First, disclosure would provide voters information on where campaign finances come from and how they are spent, thereby helping create a more educated voting public. H.R. REP. NO. 564, 92d Cong., 1st Sess. 4 (1971). Second, public exposure of the sources of contributions and expenditures would deter actual corruption and avoid the appearance of corruption. S. REP. NO. 689, 93rd Cong., 2d Sess. 2 (1974). Finally, the compilation of records through disclosure would help detect possible violations of contribution limits. 424 U.S. at 67-68.

112. "There could well be a case . . . where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied." *Buckley*, 424 U.S. at 71 (1976). *See, e.g.*, Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); Doe v. Martin, 404 F. Supp. 753 (D.D.C. 1975).

113. 655 F.2d 380 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981). The detailed facts of *MNPL* were not disputed by the parties.

114. 2 U.S.C. § 441b(b)(2)(C) (1976). Separate segregated funds are established by corporations, labor organizations (such as the IAM), or membership organizations for the purpose of soliciting political contributions from their members. Any separate segregated fund established under 2 U.S.C. § 441b(b)(2)(C) is defined as a political committee. 11 C.F.R. § 100.5(b) (1982).

(IAM),[115] and was registered with the FEC as a multi-candidate political committee.[116] The FEC concluded that MNPL's contributions to the draft-Kennedy committees were subject to the contribution limits of the Act,[117] because the draft-Kennedy committees were "political committees" within the meaning of the Act. The MNPL, on the other hand, contended the draft committees were "engaged only in pre-candidacy activities" and that the FEC lacked jurisdiction over such activities.[118]

The IAM first voiced its disenchantment with the policies of President Carter, whom it had supported in the 1976 Presidential election,[119] in September 1978. IAM President William W. Winpisinger sharply criticized the President during a speech evaluating Carter's administration.[120] A few

115. The IAM promotes itself as an organization emphasizing support for "friends of labor." Its political arm is the MNPL. The IAM has traditionally supported Democratic candidates, but does not always adhere to the party line. The IAM is the third largest labor organization in the United States, consisting of approximately 879,000 members, ranking only behind the AFL-CIO and UAW. *See* Republican Nat'l Comm. v. FEC, 487 F. Supp. 280, 305-06 (S.D.N.Y.) (Appendix "A"), *aff'd summarily*, 445 U.S. 955 (1980) (discussing advantages of labor organization support under the FECA).

116. 2 U.S.C. § 431(4) (Supp. IV 1980); 11 C.F.R. 100.5(e)(3) (1982). A multi-candidate committee is a registered political committee that "has received contributions for Federal elections from more than 50 persons" and "has made contributions to 5 or more Federal candidates." *Id.*

117. 2 U.S.C. § 441a (1976), provides in pertinent part that:

> (a)(1) No person shall make contributions—
>
> (A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;
>
> (B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or
>
> (C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.
>
> (2) No multi-candidate political committee shall make contributions—
>
> (A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;
>
> (B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or
>
> (C) to any other political committee in any calendar year which in the aggregate exceed $5,000
>
> (3) No individual shall make contributions aggregating more than $25,000 in any calendar year. . . .

2 U.S.C. § 441a(a)(1), (2), (3) (1976). *See* 2 U.S.C. § 441b (1976) (amended 1980) (contribution limitations applicable to banks, corporations, and labor organizations); *see infra* notes 128-30 and accompanying text.

The Commission concluded that the MNPL "is not only subject to the contribution limitations of 2 U.S.C. § 441a, but also to the restrictions of 2 U.S.C. § 441b as to any of its activities in connection with federal elections." Petition for Writ of Certiorari at 3 n.2, FEC v. MNPL, 454 U.S. 897 (1981) (cert. denied).

118. Brief in Opposition of Machinists Non-Partisan Political League at 6, FEC v. MNPL, 454 U.S. 897 (1981) (cert. denied).

119. The branches of the IAM spent an estimated $151,358 for support of Carter's election and $199,541 for voter registration and get-out-the-vote drive in 1976. Republican Nat'l Comm. v. FEC, 487 F. Supp. 280, 305-06 (S.D.N.Y.) (Appendix "A"), *aff'd summarily*, 445 U.S. 955 (1980).

120. Winpisinger stated in part:

> President Carter has abandoned his constituency, his party's platform, and his own campaign pledges. Carter may be the best Republican President since Herbert Hoover. Look at his record.
>
> . . . .
>
> President Carter—to me—is through. He is a weak, vascillating [sic] and ineffective

weeks later, Winpisinger proclaimed that Carter "does not merit our support, because he has abandoned his party's principles, platform, campaign pledges and the constituency which put him in office."[121] President Carter, however, maintained those policies that were unpopular with the IAM. By February 1979, the IAM and MNPL began forming draft-Kennedy groups throughout the nation.[122] The alleged goal of these groups was to convince Senator Edward M. Kennedy to become a Presidential candidate.[123] Between May 1979 and the time when Senator Kennedy declared his candidacy in early November, the MNPL gave approximately $30,000 to draft-Kennedy groups in seven states.[124] During this time, after the MNPL had made its draft-Kennedy contributions and before Kennedy formally declared his candidacy, the Carter-Mondale Campaign Committee filed a complaint with the FEC against MNPL.[125]

B. *The FEC's Investigation of the Draft-Kennedy Committees*

The Carter-Mondale complaint alleged that nine draft-Kennedy committees[126] were in violation of various provisions of the FECA.[127] Specifically, it alleged: (1) that these nine draft committees were "political committee(s)" as the FECA defines that term,[128] (2) that the nine named

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> President. I know as well as anyone, that those are dangerous words. I know how easy it is for an incumbent-sitting president to launch some spectacular and recoup his image almost overnight. This guy had the opportunity to become a fresh, young leader with a resolve and a drive to lead this country out of the Nixon/Ford aftermath.

Brief for Appellant at 6-7, FEC v. MNPL, 655 F.2d 380 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981).

121. *Id.* at 7.

122. *Id.* Early draft-Kennedy groups were formed in Iowa, Illinois, and Florida. By late summer 1979, New Hampshire, Indiana, Wisconsin, and Hawaii also had received donations from MNPL. *Id.* at 7-10.

123. *Id.* at 8. The purpose of the draft-Kennedy groups was elaborated in Winpisinger's "National Call for Kennedy" letter, which the draft committees distributed during 1979. The letter stated that "you and I simply must find a way to convince Senator Edward Kennedy to run for the Presidency next year," and that the committees will have achieved their goal once Kennedy announced his candidacy. Upon achieving this desired goal, the committees would terminate their existence. *Id.*

124. *Id.* at 7. *See supra* note 122.

125. *See* 2 U.S.C. § 437g(a) (1976) (amended 1980). Any individual or group who believes a violation of the Act has occurred may file a complaint with the Commission. 2 U.S.C. § 437g(a)(1) (Supp. IV 1980). Once the complaint is received, the Commission may commence an investigation of the charged party only if it has "reason to believe" that a violation has occurred or is about to occur. *Id.* at § 437g(a)(2).

126. The nine draft committees were: Florida for Kennedy Committee; New Hampshire Democrats for Change; Democrats for Change in 1980; National Call for Kennedy; Illinois Citizens for Kennedy; Committee for Alternatives to Democratic Presidential Candidate; Minnesotans for a Democratic Alternative; D.C. Committee for a Democratic Alternative; and Citizens for a Democratic Alternative in 1980. Brief for Appellee at 3 n.2, FEC v. MNPL, 655 F.2d 380 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981).

127. *MNPL*, 655 F.2d at 383.

128. *See* 2 U.S.C. § 431(d) (1976) (amended 1980). If the draft committees were determined to be political committees under the Act, then the MNPL contributions to them would be subject to various provisions of the FECA. *See infra* notes 176-89 and accompanying text. Most important, MNPL and the draft committees would be required to comply with the contribution limitations provided in 2 U.S.C. § 441a (1976). *See supra* note 117.

draft committees were affiliated within the meaning of the Act,[129] and therefore all were subject to a single $5,000 contribution limitation,[130] and (3) that MNPL had exceeded this contribution limit, thereby violating the Act. The Carter-Mondale complaint expressly declined to give its opinion on whether Senator Kennedy had become a "candidate" for the purposes of the Act.[131]

Based on the Carter-Mondale complaint, the FEC found "reason to believe"[132] that MNPL had violated certain provisions of the Act.[133] On November 5, 1979, the FEC issued a "sweeping subpoena" to MNPL,[134] requesting all materials and documents made in connection with any communication between MNPL and the draft-Kennedy groups.[135] The subpoena also ordered MNPL to "*provide a list of every official, employee, staff member, and volunteer of the organization, along with their respective telephone numbers.*"[136] MNPL moved to quash the subpoena for lack of subject matter jurisdiction but the FEC denied the motion on November 27, 1979.[137] MNPL contin-

129. *See* 2 U.S.C. § 441a(a)(5) (1976); 11 C.F.R. § 110.3(a)(1)(ii)(D) (1982).

If political committees are held to be affiliated, then all such affiliated political committees are treated as a single "political committee" for the purpose of contribution limitations. Thus, individuals would be prohibited from making contributions in the aggregate in excess of $5,000 to the entire group of affiliated "political committees." If political committees are held to be unaffiliated, then individuals may contribute up to $5,000 to each, up to a total of $25,000. Additionally, if political committees are found to be unaffiliated, a multicandidate political committee, such as MNPL, may give up to $5,000 to each political committee. But if the committees are affiliated, a multi-candidate political committee can contribute only $5,000 to the whole group. 2 U.S.C. § 441a(a) (1976). Thus, there is a considerable financial advantage to a candidate who obtains the support of unaffiliated political committees. *See* Wash. Post, Sept. 16, 1979, at A1, A4, col. 1.

130. *See* 2 U.S.C. § 441a(a)(1)(C), (a)(2)(C) (1976).

131. *MNPL*, 655 F.2d at 383.

132. *See* 2 U.S.C. § 437g(a)(2) (1976) (amended 1980); *see supra* note 124.

133. The FEC stated that it had "reason to believe" that:

> [B]y contributing, in aggregate, in excess of $5,000 in a calendar year to [various draft-Kennedy committees] MNPL may have violated 2 U.S.C. § 441a(a)(2)(C). The Commission has determined that these committees, among others, may be affiliated within the meaning of the Act and the Commission's regulations and that, if affiliated, contributions to them must be aggregated for purpose of the limitations set forth in 2 U.S.C. § 441a(a)(2)(C).

Letter from William C. Oldaker, General Counsel of the FEC, to Howard F. Dow, Secretary-Treasurer of the MNPL (Oct. 19, 1979), *quoted in MNPL*, 655 F.2d at 383.

134. *See* 2 U.S.C. § 437d(a)(3), (4) (1976) (amended 1980) (provides FEC power to issue subpoenas).

135. *MNPL*, 655 F.2d at 384. The subpoena also requested:

> All documents and materials (including but not limited to minutes, notes, memoranda, or records of telephone conversations) relating to meetings, discussions, correspondence, or other internal communications whereby the MNPL or any of its committees or sub-units determined to support or oppose any individual in any way for nomination or election to the office of President in 1980.

Id.

136. *Id.* (emphasis in original). The extreme broadness and delicate nature of the subpoena became an essential factor in the appellate court's decision to require a showing of subject matter jurisdiction by the FEC before court enforcement of the subpoena. *See infra* notes 166-72 and accompanying text.

137. Brief for Appellee, *supra* note 126, at 5-6 and Brief for Appellant at 19-20, FEC U. MNPL, 655 F.2d 380 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981). (Commission decided to postpone all decisions regarding subject matter jurisdiction until investigation of MNPL was completed). *See* 11 C.F.R. § 111.6 (1982). *See also*, 2 U.S.C. § 437d(a)(3), (4) (1976); 11 C.F.R. § 111.13 (1982).

ued to refuse to comply with the subpoena.

C. *The District Court Proceedings*

The FEC then filed suit in the District Court for the District of Columbia to force MNPL to comply with its subpoena.[138] MNPL objected on the grounds that the FEC lacked jurisdiction over the subject of the inquiry and that the Commission must demonstrate a compelling need for the materials sought because of the sensitive first amendment nature of the materials. The Commission, according to MNPL, could not demonstrate the requisite need to obtain information concerning the draft-committee activities at issue.[139]

The district court enforced the FEC's subpoena demand in late January 1980, holding that MNPL's jurisdictional objections could not be properly heard in a subpoena enforcement proceeding.[140] Applying the test established in *United States v. Morton Salt Co.*,[141] the court stated that three requirements must be satisfied in order to enforce the subpoena. First, "the inquiry must be made within the authority of the agency."[142] The court stated that "[i]t was just this type of matter that caused Congress to set the whole machinery in motion when it enacted the statute."[143] The inquiry, therefore, was within the FEC's authority. Second, the demand may not be too indefinite. Here, the court found that because of the very nature of the subject matter, the sweeping character of the subpoena was as restrictive as possible.[144] Finally, the materials sought must be "reasonably relevant." The district court found that the information was necessary for the Commission to carry out its duties under the Act.[145] The district court additionally rejected MNPL's first amendment objections, giving minimal consideration to the issue.[146]

III. THE CIRCUIT COURT'S ANALYSIS IN *FEC v. MNPL*

The analysis in *MNPL* extends beyond that in any previous draft-committee litigation.[147] In earlier subpoena enforcement proceedings involving

138. 2 U.S.C. § 437d(b) (1976) (upon petition by the Commission, the district court may require compliance with a subpoena issued by the FEC if the subpoenaed party refused to adhere to the Commission's demand).

139. Brief for Appellant, *supra* note 137, at 21-22.

140. For the text of the district court's opinion and order see Joint Appendix at 13-17, FEC v. MNPL, 655 F.2d 380 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981).

141. 338 U.S. 632 (1950). *See supra* notes 76-100 and accompanying text.

142. Joint Appendix, *supra* note 140, at 13.

143. *Id.* at 13-14.

144. *Id.* at 14.

145. *Id.*

146. *Id.*

147. Another case concerning draft committees, FEC v. Citizens for Democratic Alternatives in 1980, 655 F.2d 397 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981), was decided the same day as *MNPL*. Like MNPL, Citizens for Democratic Alternatives in 1980 (CDA) was an organization which advocated Senator Kennedy's entrance into the Presidential campaign. The CDA was alleged to have received contributions in violation of the Act. *See* 2 U.S.C. § 441a(a), (f) (1976). The court found no distinctions between the issues raised in the cases and held in *FEC v. CDA*, as in *MNPL*, that the CDA was not subject to the Act's provisions, thereby making the subpoena unenforceable.

The CDA was formed in August 1979 by individuals who sought an alternative to Presi-

draft groups, the district courts had refused to hear jurisdictional arguments.[148] Unlike these earlier cases, *MNPL* was decided on jurisdictional merits rather than purely subpoena enforcement grounds. The court refused to restrict itself to the *Morton Salt*[149] test, which is customarily employed to "rubber stamp" judicial enforcement of federal agency subpoena requests.[150]

The court divided its issue analysis into two prongs. The first prong examined whether the district court should have determined if there was subject matter jurisdiction for the Commission's investigation before it enforced the subpoena.[151] The circuit court held that such determination was necessary. The second prong called for an evaluation of whether the FEC actually had the requisite subject matter jurisdiction to conduct the investigation.[152]

A. *Standards for Judicial Enforcement of the FEC Subpoena*

In the first prong the court analyzed the appropriate standards for judicial enforcement of an FEC subpoena. The *Morton Salt* test was cited as providing the criteria previously used in enforcing subpoenas of a commercial or corporate character.[153] The court in *MNPL* also presented the applicable limitations to the *Morton Salt* analysis.[154] Such limitations exist when there is a "patent lack of jurisdiction,"[155] or where an agency overreaches the authority granted by Congress.[156] The court went on to list four factors which made it especially important for a court to assure itself that the FEC investigation was within the subject matter jurisdiction of the Commission before lending its authority to enforce the subpoena.[157]

First, the court stated that the FEC's investigation of the draft-Kennedy groups denoted an unprecedented assertion of subject matter jurisdiction over draft committees.[158] The court declared that "extra-careful scrutiny" should be used because of this untried extension of FEC investigatory au-

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dent Carter in the 1980 Presidential election. Brief in Opposition of Citizens for Democratic Alternatives in 1980 at 3, FEC v. CDA, 454 U.S. 897 (1981) (cert. denied). The CDA received some funding; however, its main activity was the compilation and distribution of a weekly newsletter which was sent to groups and individuals sympathetic to CDA's draft-Kennedy views. *Id.* Once Senator Kennedy announced his candidacy, the CDA disbanded. *Id.* at 4.

148. *See* FEC v. Florida for Kennedy Comm., 492 F. Supp. 587 (S.D. Fla. 1980), *rev'd*, 681 F.2d 1281 (11th Cir. 1982); FEC v. Wisconsin Democrats for Change in 1980, No. 80-C-124 (W.D. Wisc. Apr. 24, 1980); *see supra* notes 61-66 and accompanying text.

149. *See supra* notes 141-46 and accompanying text.

150. *See supra* notes 78-100 and accompanying text.

151. 655 F.2d at 384.

152. *Id.*

153. *Id.* at 385. For a full discussion of judicial enforcement of agency subpoenas, see *supra* notes 78-100 and accompanying text.

154. 655 F.2d at 385-86.

155. *Id.* at 386 (quoting CAB v. Deutsche Lufthansa Aktiengesellschaft, 591 F.2d 951, 952 (D.C. Cir. 1979)).

156. 655 F.2d at 386 (quoting Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 217 (1946)).

157. 655 F.2d at 386-90.

158. *Id.* at 386. The two other cases on draft-candidate committees were subpoena enforcement proceedings against the same draft-Kennedy Committees involved in *MNPL*. FEC v. Florida for Kennedy Comm., 492 F. Supp. 587 (S.D. Fla. 1980), *rev'd*, 681 F.2d 1281 (11th Cir.

thority.[159] The investigative domain of the FEC was distinguished from investigative functions of other agencies. Although other agencies administer regulations in the commercial and corporate areas, the FEC's subject matter extends over individuals and groups "*only insofar as they act, speak and associate for political purposes.*"[160] It was precisely this contrast in the characteristics of subject matter jurisdiction that was one of the foundations for a more intensive level of scrutiny.

Second, the court contrasted the scope of investigative authority granted to the FEC with the broad investigatory power of other agencies,[161] such as the Federal Trade Commission[162] or the Securities and Exchange Commission.[163] Because of the corporate and business regulatory functions of these agencies, the judiciary has permitted them to investigate in a general, roving manner.[164] Such agencies have the ability to commence inquiries on their own initiative. The FEC, however, does not have such liberal investigative powers. The Commission may only launch an investigation pursuant to a signed, sworn, and notarized complaint filed by an individual or group.[165] The severe contrast between the scope of investigatory power of the FEC and of other agencies supported the requirement that a court assure itself of statutory jurisdiction before enforcing an FEC subpoena.

The third and most significant reason for demanding careful judicial scrutiny, was the "delicate nature of the materials demanded in [the FEC's] broad subpoena."[166] The first amendment, the court said, was intended to protect the very subject matter of the subpoena's request.[167] By enforcing disclosure of these "delicate materials," the government would obtain firsthand knowledge of which citizens were contributing to the defeat of the current administration. The compelled release of such information, therefore, carried a great potential for "chilling" the first amendment guarantees of free exercise of political speech and association.[168]

1982); FEC v. Wisconsin Democrats for Change in 1980, Order No. 80-C-124 (W.C. Wisc. Apr. 24, 1980). Both of these decisions enforced the subpoena order.

159. 655 F.2d at 387.

160. *Id.* (emphasis in original). *See* 2 U.S.C. §§ 431, 441a (1976 & Supp. IV 1980).

161. 655 F.2d at 387.

162. 15 U.S.C. § 46 (1976).

163. 15 U.S.C. § 78u (1976).

164. An early line of case law sought to restrict agency investigatory powers, often denying enforcement of subpoenas unless a definite need for the requested materials was shown. *See, e.g.*, Jones v. SEC, 298 U.S. 1 (1936); FTC v. American Tobacco Co., 264 U.S. 298 (1924); Harriman v. ICC, 211 U.S. 407 (1908). The Court later altered its position by permitting agencies to conduct "fishing expeditions" for the purpose of merely satisfying their official curiosity. *See, e.g.*, United States v. Powell, 379 U.S. 48 (1964); United States v. Morton Salt Co., 338 U.S. 632 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943). The limited role of subpoena enforcement proceedings was used to support the roving agency investigations. For general discussion of judicial subpoena enforcement proceeding see 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4 (2d ed. 1978); *supra* notes 78-100 and accompanying text.

165. 2 U.S.C. § 437g(a)(1) (1976) (amended 1980).

166. 655 F.2d at 388.

167. *Id.* "[P]olitical expression and association concerning federal elections and officeholding" are the heart of intended first amendment guarantees. *Id.*

168. The court also pointed out that the requested FEC information "is of a fundamentally different constitutional character" than the commercial or corporate information sought by SEC or FTC investigations. *Id.*

The court then reviewed the *NAACP v. Alabama ex rel. Patterson*[169] line of cases which requires the state to show a compelling and subordinating interest before a court will force disclosure of information that would infringe on first amendment guarantees.[170] In its decision, the *MNPL* court did not require the FEC to demonstrate a compelling interest before it could procure the information from MNPL. Instead, it assumed *arguendo* that if statutory jurisdiction to conduct the investigation could be established, then the FEC could show a compelling interest for the investigation. If, on the other hand, the Commission lacked jurisdiction over draft committees, then no compelling interest could possibly exist.[171] Thus, due to the sensitive character of the requested information, it became even more important for the court to assure itself that the FEC had jurisdiction to conduct this investigation before the subpoena would be enforced.[172]

The fourth and final factor causing the court to examine the jurisdiction issue closely was that the FEC's claim of jurisdiction over draft-candidate groups "rest[ed] solely upon a legal interpretation of the statute which [did] not depend upon any facts sought to be gleaned through the subpoena."[173] The finding of jurisdiction depended purely on a statutory interpretation of whether draft committees are "political committees" under the FECA. Additional facts obtained through the enforcement of a subpoena would have no bearing on this legal determination.[174]

The court in *MNPL* concluded that the combination of these four factors required a court to assure itself that an FEC investigation was within the subject matter jurisdiction of the Commission before a subpoena could be enforced.[175] The highly deferential attitude espoused in *Morton Salt* was not adopted by the *MNPL* court in this novel political association context. The next logical step was to determine whether the Commission did, in fact, have jurisdiction over draft-candidate groups. This was the second prong of the court's decision.

B. *FEC Jurisdiction Over Draft-Candidate Groups*

If a draft-candidate group is to come within the strictures of the FECA, thus conferring FEC jurisdiction, it must fit within the definition of a political committee.[176] The FEC argued that the draft-Kennedy groups were

169. 357 U.S. 449 (1958). *See also* Bates v. City of Little Rock, 361 U.S. 516 (1960); Sweezy v. New Hampshire, 354 U.S. 234 (1957); *supra* notes 101-12 and accompanying text. These protections are especially critical in an election setting. *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971).

170. 655 F.2d at 389.

171. *Id.*

172. *Id.*

173. *Id.* at 389-90. The court cited a series of cases from the Seventh Circuit that relax the *Morton Salt* and *Oklahoma Press* rule of "rubber stamp" judicial subpoena enforcement where "the issue involved is a strictly legal one not involving the agency's expertise or any factual determinations." *Id.* at 390 n.19 (quoting FTC v. Miller, 549 F.2d 452, 460 (7th Cir. 1977)). *See* FTC v. Feldman, 532 F.2d 1092, 1096 (7th Cir. 1976); Jewel Cos. v. FTC, 432 F.2d 1155, 1159-60 (7th Cir. 1970).

174. 655 F.2d at 390.

175. *Id.*

176. *See supra* note 47.

political committees according to the Act's operative terms.[177] MNPL, on the other hand, asserted that none of the groups to which it contributed were political committees, thereby making the Act's provisions inapplicable to it.[178]

The court in *MNPL*, relying on *Buckley v. Valeo*'s narrow interpretation of the term "political committee,"[179] held draft groups to be outside the political committee definition.[180] The Court in *Buckley* stated that a broader definition of political committee could subject nearly any group partaking in issue discussion to the wide-ranging and cumbersome provisions of the Act.[181] The sole justification permitting contribution ceilings to be constitutionally maintained was FECA's aim "to limit the actuality and appearance of corruption resulting from large financial contributions."[182] The court in *MNPL* found that the danger of corruption perpetrated by draft committees was far from specifically identified, since a draft group's activities are not related to a declared candidate.[183] Draft committees are merely trying to convince an individual to become a candidate; they are not "promoting a candidate" as provided in the Act's definition of "candidate."[184]

Buckley's limited definition of political committee, adopted in *MNPL*, provides that to fulfill the purposes of the Act a group can be a political committee only if it is "under the control of a candidate or [its] major purpose . . . is the nomination or election of a candidate."[185] Since draft committees did not fall within the *Buckley* Court's limited definition of political committee under the Act, and since draft groups' potential for corruption was not specifically identified, the court in *MNPL* would not grant the FEC jurisdiction over the draft-Kennedy committees.[186]

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177. 655 F.2d at 390.

178. *Id.*

179. 424 U.S. 1, 79 (1976). *See also* United States v. National Comm. for Impeachment, 469 F.2d 1135, 1142 (2d Cir. 1972); ACLU v. Jennings, 366 F. Supp. 1041, 1055-57 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom.*, Staats v. ACLU, 422 U.S. 1030 (1975). For a detailed discussion of *Buckley*'s limited definition of political committees see *supra* notes 47-60 and accompanying text.

180. 655 F.2d at 390-96.

181. 424 U.S. at 79. *See supra* note 48.

182. *Id.* at 26. *See supra* notes 45-46 and accompanying text. The danger of corruption or appearance of corruption must be actually identified for the Act's limitations to be justified against first amendment guarantees. *Buckley*, 424 U.S. at 26-29.

183. 655 F.2d at 392.

184. *Id.* The FECA specifically defined the term "candidate" in pertinent part as:

> [A]n individual who seeks nomination for election, or election, to Federal office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, if he has . . . (2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office. . . .

2 U.S.C. § 431(b) (1976) (amended 1980).

185. 655 F.2d at 392 (quoting Buckley v. Valeo, 424 U.S. 1, 79 (1976)). The Court in *Buckley* based its limited definition of political committees on three lower court opinions, Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975) (en banc), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976); United States v. National Comm. for Impeachment, 469 F.2d 1135 (2d Cir. 1972); ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom.*, Staats v. ACLU, 422 U.S. 1030 (1975). These cases are discussed in *MNPL*. *See MNPL*, 655 F.2d at 392-94. For a discussion of the *National Committee* and *Jennings* cases see *supra* notes 51-60 and accompanying text.

186. 655 F.2d at 392-94.

An examination of the Act's legislative history added support to the court's holding in *MNPL*. The court declined to interpret statutory silence regarding draft committees as congressional intent to include these groups within the meaning of the Act.[187] Moreover, to construe the definition of political committees broadly would risk violating the Supreme Court's limited definition given to that term in *Buckley*. The court noted its duty to arrive at a result free from constitutional doubts.[188] Due to the lack of any clear legislative intent to include draft groups under the Act's contribution limits, the court refused to extend the meaning of the provision, thereby avoiding any constitutional conflict with the *Buckley* decision.[189]

C. *The Court's Conclusion in* MNPL

The court concluded that in order to protect first amendment guarantees against unwarranted disclosure, where a "serious and novel question of the Commission's subject matter jurisdiction is presented,"[190] the district court must find subject matter jurisdiction prior to enforcing the Commission's subpoena.[191] Since the FEC lacked the requisite jurisdiction over draft committees, the subpoena could not be enforced.[192]

The court also approved a previously suggested two-step procedure to be employed when the Commission needs additional factual information before a sound jurisdictional decision can be made.[193] In *Reader's Digest Association v. FEC*,[194] a New York district court set out this two-step procedure,

187. *Id.* at 394.

188. *Id.* "It is [the Court's] duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality." *Id.* (quoting Richmond Co. v. United States, 275 U.S. 331, 346 (1928)). *See generally* United States v. Rumely, 345 U.S. 41, 45, 47 (1953); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937); Ashwander v. TVA, 297 U.S. 288, 341, 346-47 (1936) (Brandeis, J., concurring); Crowell v. Benson, 285 U.S. 22, 62 (1932).

189. 655 F.2d at 394. The court in *MNPL*, citing United States v. National Comm. for Impeachment, 469 F.2d 1135, 1139 (2d Cir. 1972), agreed that the legislative history, prior to 1979, is silent regarding the extent of the definition of political committees, leaving it to the courts to set the parameters of the definition. 655 F.2d at 394.

The amendments enacted in 1980, according to the court, furnished some insight as to whether the contribution limits were intended to cover draft groups. In response to continued FEC requests to establish FEC jurisdiction over draft groups, Congress made the reporting provisions applicable to draft committees. *See* H. R. REP. NO. 422, 96th Cong., 1st Sess. 15, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 2860, 2874 (change was specifically made to require draft organizations to report). Nonetheless, Congress refused to subject draft committees to the Act's contribution provisions. Indeed, as the court in *MNPL* stated, "not even a whisper about limiting contributions to 'draft' groups has ever been heard in the legislative history of FECA." 655 F.2d at 395. *See supra* notes 51-60 and accompanying text.

190. 655 F.2d at 396.

191. *Id.*

192. *Id.*

193. *Id.*

194. 509 F. Supp. 1210 (S.D.N.Y. 1981). Reader's Digest sued to enjoin the FEC from continuing an investigation into possible violations of the FECA through Reader's Digest's distribution of a computer reenactment of Senator Kennedy's accident at Chappaquiddick. *Id.* at 1211. The reenactment had been commissioned by Reader's Digest in connection with an article on the Chappaquiddick accident. Reader's Digest claimed the article was protected by both the first amendment and the news story exemption of 2 U.S.C. § 431(9)(B)(i) (Supp. IV 1980), and that the investigation was therefore outside the FEC's statutory jurisdiction. 509 F. Supp. at 1212. Section 431(9)(B)(i) exempts from FECA coverage any news story, commentary, or

the purpose of which is to achieve an appropriate balance between first amendment protections and the agency's need for effective investigations.[195] The first step permits information to be subpoenaed for the purpose of determining whether statutory jurisdiction exists.[196] If, on the basis of this information, the Commission makes a finding of "probable cause" that it has jurisdiction to conduct the investigation, then under the second step, the investigation may be extended to determine whether substantive violations have taken place.[197] The *MNPL* court readily accepted the utilization of the initial "limited subpoena" for future FEC litigation.[198]

IV. ANALYSIS OF THE CIRCUIT COURT'S OPINION

A. *An Evaluation of the Court's Rationale in* MNPL

The balance between first amendment rights and the public's right to an informative election process has traditionally been a delicate one.[199] Although the court's holding was essentially one of statutory interpretation, the constitutional overtones heavily influenced its rationale.

The court's analysis in *MNPL* was fundamentally sound, since the issues could not have been scrutinized in any other sequence. If the threshold question—whether the district court *should* determine that subject matter jurisdiction existed before enforcing the subpoena—was answered in the negative, then it was senseless to proceed to the succeeding question. In this first prong, the court initially distinguished administrative subpoenas in a corporate or commercial context from FEC subpoenas in the political associational context.[200] After laying this groundwork, the court presented four characteristics of the Commission's subpoena, which together, required the district court to assure itself of the FEC's subject matter jurisdiction prior to enforcing the subpoena.[201]

The first two factors presented by the court were readily justified. First, the unprecedented nature of the FEC investigation and the political character of the subpoena supported the requirement that the district court determine the existence of statutory jurisdiction before enforcing the Commission's subpoena.[202] Second, the limited scope of the FEC's investigatory power, as compared to the broad investigatory powers of other agen-

editorial distributed by a broadcasting station or publication, unless such facility is owned or controlled by a candidate, party, or political committee.

195. 509 F. Supp. at 1215; *see MNPL*, 655 F.2d at 396-97.

196. In *Reader's Digest*, this preliminary investigation would seek to determine whether the FECA's statutory exemption is applicable. 509 F. Supp. at 1215. *See* 2 U.S.C. § 431(9)(B)(i) (Supp. IV 1980).

197. 509 F. Supp. at 1215. The *Reader's Digest* test, as well as *MNPL*'s four factors that require heightened judicial scrutiny of an FEC investigation during a subpoena enforcement proceeding, has subsequently been adopted in FEC v. Phillips Publishing, Inc., 517 F. Supp. 1308 (D.D.C. 1981).

198. 655 F.2d at 397.

199. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (Court balanced first amendment restrictions on political expression against Act's discouragement of political corruption). *See also* Burroughs v. United States, 290 U.S. 534 (1934).

200. 655 F.2d at 385. *See supra* notes 153-56 and accompanying text.

201. 655 F.2d at 386-90. *See supra* notes 157-75 and accompanying text.

202. 655 F.2d at 387. *See supra* notes 158-60 and accompanying text.

cies, also pointed toward the need for ascertaining subject matter jurisdiction prior to the enforcement of an FEC subpoena.[203] These factors alone, however, did not warrant a departure from past subpoena enforcement practices.[204] It was the third factor, the "delicate nature of the materials demanded,"[205] that was the most significant reason for requiring scrutiny of subject matter jurisdiction.

If disclosure of these "delicate materials" would, in fact, infringe upon first amendment rights of political association, the court must first assure itself that the Commission has the right to obtain the information. For example, if the subpoena were enforced and subject matter jurisdiction were subsequently found to be lacking, the disclosing group's rights would have been violated without any adequate remedy.[206] Once the names and materials are disclosed, the judiciary cannot erase that knowledge from the minds of those who have become privy to the information. Hence, the court appropriately adopted the requirement that a subordinating and compelling state interest must be shown if compulsory disclosure would infringe on first amendment guarantees.[207] This interest cannot be shown in the absence of subject matter jurisdiction.

The final factor—that the jurisdiction issue was a purely legal matter for which no additional facts were needed—provided another strong reason for requiring the district court to find subject matter jurisdiction before enforcing the subpoena.[208] The rationale of the preceeding factor is applicable here. Thus, if there is no need or basis for the subpoenaed material, there is no reason to risk an unnecessary violation of an individual's constitutional rights.

In the second prong of its analysis the court in *MNPL* properly found draft committees to be outside the sphere of the FECA's contribution restrictions. The court accurately applied the *Buckley* decision's narrow construction of the term "political committee"[209] to find draft committees excluded from that definition.[210] In addition, the court saw the lack of legislative discussion of draft groups, along with the FEC's efforts to acquire coverage of draft committees, as demonstrating an absence of statutory jurisdiction.[211] In conclusion, the court also proposed a means of handling similar problems

203. 655 F.2d at 387. *See supra* notes 161-65 and accompanying text.

204. *See supra* notes 78-100 and accompanying text.

205. 655 F.2d at 388.

206. *See generally* NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449 (1958); Sweezy v. New Hampshire, 354 U.S. 234 (1957); United States v. Rumely, 345 U.S. 41 (1953).

207. 655 F.2d at 389. *See* Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449, 463 (1958); Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring). *See supra* notes 105-112 and accompanying text.

Although the court did not require the FEC to demonstrate a compelling interest, the court assumed that the Commission could meet this standard if it had jurisdiction over draft groups. 655 F.2d at 389. This assumption was made for the purpose of avoiding discussion of an issue that would not be reached.

208. 655 F.2d at 389-90.

209. *Buckley*, 424 U.S. at 79.

210. 655 F.2d at 391-94.

211. *See supra* notes 176-89 and accompanying text.

in the future[212] by adopting the two-step procedure provided in *Reader's Digest Association v. FEC*.[213]

Less than two months after the *MNPL* decision was handed down, the United States District Court for the District of Columbia, in *FEC v. Phillips Publishing, Inc.*[214] applied the *MNPL* analysis to an FEC subpoena enforcement proceeding. The court in *Phillips Publishing* employed *MNPL*'s four factors to determine that the FEC's subject matter jurisdiction should be carefully scrutinized before enforcing the subpoena.[215] The district court further stated that if an enforcing court decides that the FEC requires additional factual information to make a reasonable determination whether jurisdiction exists, then the *Reader's Digest* two-step procedure may be employed.[216] But the "district court need not permit further investigation by the FEC if additional factual information is not needed to determine whether the FEC has jurisdiction."[217] *Phillips Publishing* presented an ideal situation for the application of the *MNPL* approach to this type of FEC litigation.

B. *Ramifications of the* MNPL *Decision*

Although the court's analysis in *MNPL* was legally and logically correct, undesirable consequences in the campaign arena are likely to flow from the decision. That the opinion was a correct analysis of the statute and case law simply illustrates the need for strengthening of the FECA. The question which arises is whether such strengthening, through coverage of draft groups by the FECA, would be constitutionally acceptable under the mandate of *Buckley*.

If contributions to draft committees continue to go unharnessed, such groups will play a larger role in upcoming elections. This would defeat the FEC's past policy of preventing the proliferation of political action committees (PAC's).[218]

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212. 655 F.2d at 396-97. *See supra* notes 193-98 and accompanying text.

213. 509 F. Supp. 1210 (S.D.N.Y. 1981).

214. 517 F. Supp. 1308 (D.D.C. 1981). In *Phillips Publishing*, the FEC ordered respondents to answer interrogatories which were sent to gather information in furtherance of its investigation. *Id.* at 1311. Phillips Publishing refused to comply with the Commission's request, claiming the press exemption of 2 U.S.C. § 431(9)(B)(i) (Supp. IV 1980). *Id.* at 1309-10.

215. 517 F. Supp. at 1311.

216. *Id.* at 1313. It is interesting to note that the *Reader's Digest* approach is used in reference to the press exemption in both *Reader's Digest* and *Phillips Publishing*. The court in *MNPL*, nevertheless, has made it applicable to cases questioning the existence of subject matter jurisdiction in other areas of FEC jurisprudence.

217. *Id.* at 1314 (citing *MNPL* as authority) (no additional information necessary since press exemption was applicable on facts before the court).

218. For discussions of FEC policy opposing proliferation of political action committees (PAC's) see Egan, *Affiliation of Political Action Committees Under the Antiproliferation Amendments to the Federal Election Campaign Act of 1971*, 29 CATH. U.L. REV. 713 (1980); Comment, *Independent Political Committees and the Federal Election Laws*, 129 U. PA. L. REV. 955 (1981).

PAC's have developed as a means of circumventing the general rule that national banks, corporations, or labor organizations are prohibited from making any expenditure or contribution to benefit any candidate of a federal primary or general election. 2 U.S.C. § 441b (1976 & Supp. IV 1980). Generally, these limitations are avoided by the creation of separate segregated funds from which the PAC can function. *See* 2 U.S.C. § 441b(b)(2)(C) (1976).

Besides merely contravening FEC policies, the *MNPL* decision will have a more critical impact. Most significantly, the decision creates a loophole in the Act's regulatory scheme. As long as a draft committee does not become formally connected with a candidate, it may receive contributions and spend money without limitation.[219] The only regulations presently applicable to draft groups are the Act's disclosure provisions.[220] These new reporting requirements will not diminish draft groups' future effectiveness in campaign finance.

Although a regulated political committee cannot accept a contribution of more than $5,000 from an individual or from a multi-candidate political committee, a draft group has no such contribution limits.[221] Thus, it is now beneficial for individuals to delay formal declarations of candidacy as long as possible. The longer a potential candidate officially stays out of the race, the more money draft groups will be able to receive and spend to "induce" that individual to run.[222] This will provide ample opportunity for a large flow of money to draft committees from both the corporate sector and individuals. An "undeclared" candidate has the potential of building up a substantial financial head start on his "declared" opponent, completely outside the FECA's reach.

The fact that a draft committee does not have the advice and direction of a candidate, as compared to a declared candidate's political committee, will not hamper the draft group's money-raising effort. There are many individuals, well established and trained in political campaign management, who could be hired to run a draft committee operation while the candidate himself remains officially detached from any campaign efforts. Moreover, such campaign managers could easily contact the potential candidate, surreptitiously, and obtain strategic viewpoints regarding operation of the draft committee.[223] Surely this was not intended in Congress regulatory game plan.

An amendment to the FECA, designed to alleviate these problems stemming from the *MNPL* decision, would bring draft committees explicitly under the contribution ceilings contained in the Act. The *MNPL* court rightly expressed constitutional misgivings over a finding that draft committees are covered by the Act, given the lack of unequivocal legislative intent to effect such coverage and the narrow definition of "political committee" in *Buckley*.[224]

A necessary prelude to a constitutionally viable amendment would be congressional hearings aimed at exploring in detail the ramifications of the

219. Wash. Post, Oct. 14, 1981, at A5, col. 1. *See* NAT'L J., Sept. 15, 1979, at 1535.

220. 2 U.S.C. § 434 (Supp. IV 1980).

221. 2 U.S.C. § 441a(a)(1)(C), (a)(2)(C) (1976).

222. The danger of this loophole was recognized by a California federal district court in Gifford v. Congress, 452 F. Supp. 802 (E.D. Cal. 1978). "If the Act did not include unofficial candidates within its purview, an obvious and enormous loophole would exist." *Id.* at 805. "For example, a candidate . . . could postpone officially qualifying for office until a large amount of money had been raised—thereby avoiding many of the Act's . . . requirements." *Id.* at 805 n.7.

223. Wash. Star, May 22, 1981 at A3, col. 1.

224. 655 F.2d at 394.

MNPL decision and the potential for undermining the purposes of the Act which those ramifications present. The resulting amendment would be based upon a finding by Congress that FECA regulation of draft committees is necessary "to limit the actuality and appearance of corruption," thereby conforming with the constitutionally sufficient justification for contribution limitations adopted in *Buckley*.[225]

Another requirement expressed in the *Buckley* opinion is that any government regulations in this area be "closely drawn to avoid unnecessary abridgment of associational freedoms."[226] In reaching its definition of "political committee" the *Buckley* court specifically reiterated its concern that the Act not be applied to "groups engaged purely in issue discussion."[227] An amendment to bring draft committees within the compass of the FECA contribution limits, therefore, should be tightly drawn in carrying out Congress intention to prevent the appearance or reality of corruption. Such an amendment should cover those groups whose activities could lead to financial war chests for undeclared candidates, and should avoid bringing within its scope groups engaged purely in issue discussion. The draft-Kennedy groups of *MNPL* should be covered, but the National Committee for Impeachment[228] or the American Civil Liberties Union[229] should not.

The Court in *Buckley* was not called upon to interpret the Act in relation to draft committees. The Court did adopt a narrow definition of "political committee," but it also was clear that in adopting this definition it was giving effect to the "core area sought to be addressed by Congress."[230] A carefully drafted amendment to the FECA, bringing draft committees within the contribution limitations in order to avoid the potential of corruption, would pass constitutional muster under *Buckley*.

The shortcomings in the FECA revealed by the *MNPL* decision can be rectified by legislative action, but the *MNPL* decision may give impetus to legislative action in quite another direction. A great deal of campaign funding comes from PAC's.[231] The *MNPL* decision will result in a vertical proliferation in the number of PAC's by enabling a single "higher" PAC to contribute freely to many "lower" draft groups set up by the "higher" PAC.[232] This vertical multiplication will most likely occur in all classes of

225. 424 U.S. 1, 26 (1976).

226. *Id.* at 25.

227. *Id.* at 79.

228. *See supra* text accompanying notes 51-57.

229. *See supra* text accompanying notes 58-60.

230. 424 U.S. at 79. *See* FEC v. Florida for Kennedy Committee, 681 F.2d 1281, 1293 (11th Cir. 1982) (Clark, J., dissenting).

231. For example, PAC contributions to the 1980 Presidential and Congressional campaigns totalled $60.5 million. FEC, Press Release (Aug. 4, 1981).

232. This is precisely what occurred in *MNPL*. The MNPL is the political arm of the IAM, a major labor union. To achieve the political aims of the IAM, MNPL set up "lower" draft-Kennedy groups. The IAM, therefore, could funnel money through the MNPL to any of these draft-Kennedy committees.

For a discussion of the development and congressional regulation of PACs as well as the constitutionality of these regulations see Birnbaum, *The Constitutionality of the Federal Corrupt Practices Act After* First National Bank of Boston v. Bellotti, 28 AM. U.L. REV. 149 (1979); Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 ARIZ. L. REV. 373 (1980); Mager, *Past and Present Attempts by Congress and the Courts to Regulate Corporate and Union*

PAC's. Different categories of PAC's traditionally contribute proportionately more to different political parties. For example, labor groups usually support Democratic candidates because of the Democrats' pro-labor policies; corporate PAC's often support Republicans because of their business sympathies.[233] Corporate PAC's comprise nearly one-half of all "non-party related" political committees, and out number labor committees nearly four to one.[234]

If all PAC's could contribute free from any FECA regulation, corporate committees' influence would become insurmountable. Assuming that the political perspectives of Republicans and business PAC's remained in accord, abolishment of all FECA contribution ceilings would give the Republicans a tremendous advantage. These tempting benefits of unlimited contributions, along with the Act's alleged ineffectiveness[235] and constant revisions,[236] have caused many Congressmen, especially Republicans, to consider scrapping the entire Act or, at the very least, cutting the agency's financing in half.[237] Such a cut in the FEC budget would complement the Reagan administration's policy of severe reductions in the federal government. Some Congressmen have recommended the abolishment of the Commission's enforcement powers on the grounds that it has become "ridden with red tape" and that the election process can be sufficiently protected from abuse by the Act's disclosure provisions.[238] President Reagan has given his support to these proposals, provided he can obtain bipartisan backing, so that it does not appear that only Republicans are assailing the

Campaign Contributions and Expenditures in the Election of Federal Officials, 1976 S. ILL. U.L.J. 338; Sorauf, *Political Parties and Political Action Committees: Two Life Cycles*, 22 ARIZ. L. REV. 445 (1980); Comment, *Corporate Political Action Committees: Effect of the Federal Election Campaign Act Amendments of 1976*, 26 CATH. U.L. REV. 756 (1977); Comment, *Independent Political Committees and the Federal Election Laws*, 129 U. PA. L. REV. 955 (1981).

233. For the 1980 Congressional elections, labor PAC's gave $11.4 million to Democratic candidates as opposed to only $.8 million to Republican contenders. The Republicans received approximately $5 million more than Democrats from corporate PAC's. FEC, Press Release (Aug. 10, 1981). In these elections, the Democrats significantly narrowed the edge that the Republicans enjoyed in contributions from corporate PAC's, while simultaneously maintaining their traditional margin over Republicans in contributions from labor PACs. Wall St. J., Sept. 25, 1980, at 8, col. 1. This division among corporate PAC's helped give the Democrats a lead in fund-raising from all PAC sources. *Id.* This PAC funding is subject to the FECA's contribution limitations. 2 U.S.C. § 441b (1976 & Supp. IV 1980).

234. FEC, Press Release (Aug. 4, 1981).

235. The FEC has been regarded as "a toothless watchdog that, through its lack of clear goals, questionable competence, and minuscule resources, is almost sure to do a poor job of policing the 1980 election[s]." BUS. WK., May 19, 1980, at 157. The recent changes in the law have been accused of failing to "drive money out of politics; they just make it easier . . . for fragmented and single-issue groups to spend funds than for candidates trying to put together a coalition. It's hard to see how this is anything like a net gain for our political system." Wall St. J., Aug. 20, 1979, at 12, col. 1. *See* Wash. Post, June 27, 1981, at A16, col. 1.

236. *See supra* note 5.

237. Wash. Post, June 18, 1981, at A20, col. 1.

238. N.Y. Times, May 19, 1981, § 2 at 12, col. 5. A further suggestion was made that if the FEC is in fact dissolved, its record keeping authority should go to either the House or Senate itself, or to the General Accounting Office. *Id. See also* Wash. Post, Nov. 21, 1981, at A3, col. 5. (Republican Party National Chairman Richard Richards urged Congress to remove contribution ceilings on the amount that parties can contribute to individual candidates). *But cf.* Wash. Post, Nov. 25, 1981, at A4, col. 1 (Senate Rules Committee attacks Sen. Roger W. Jepsen's proposal for abolishment of FEC).

Commission.[239]

The *MNPL* decision adds support to the mounting dissatisfaction with the FECA and the FEC. Although the Act's regulatory scheme continues to receive substantial support, Congress growing disenchantment with the Commission, the President's willingness to revoke many, if not all, of the Act's powers, and the judiciary's reluctance to extend the Act, all point toward a possible final day of reckoning for the FECA in the not too distant future.

V. CONCLUSION

The *MNPL* decision provided a logical and effective answer to the novel issue presented. Although turning away from judicial authority in some respects, the court concluded that in this unprecedented area, the district court should first determine whether subject matter jurisdiction existed for the FEC's investigation before enforcing the Commission's subpoena. The court in *MNPL* then held that the Commission's investigation of draft groups lacked subject matter jurisdiction since draft groups did not fall within the Act's political committee definition. Nevertheless, the *MNPL* court has created a loophole in the FECA's regulatory scheme. A draft committee now will be able to receive unlimited contributions for an undeclared candidate, thus encouraging potential candidates to avoid declaring candidacy until the last possible moment and adding confusion to an already chaotic campaign process. An amendment to the FECA could close this loophole, but the court's opinion will add momentum to the growing dissatisfaction with the FEC, thereby increasing the possibility of repeal or drastic modification of the Act.

239. Wash. Post, June 18, 1981, at A20, col. 1.

OBSCENITY LAW IN COLORADO: THE STRUGGLE TO PASS A CONSTITUTIONAL STATUTE

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I. INTRODUCTION

Despite repeated efforts of legislators over the past decade, Colorado does not have an obscenity statute that has withstood constitutional challenge. Legislative enactments in the area have either been vetoed by the governor,[1] struck down as unconstitutional by the state supreme court,[2] or repealed by the legislature in favor of a "tougher" law.[3]

The legislature's most recent attempts to control obscenity were embodied in two statutes enacted during the 1981 session. One statute prohibits the promotion of obscene material,[4] and the other statute controls children's exposure to any sexually explicit material.[5] Rulings at the trial court level have found significant constitutional defects in both of these statutes, and challenges to them are presently pending before the Colorado Supreme Court.[6]

In *Miller v. California*,[7] the United States Supreme Court reaffirmed the principle that obscenity is not protected speech under the first amendment to the Constitution and set forth specific guidelines for state legislatures to follow in regulating obscenity.[8] In light of the "how to" instructions contained in the *Miller* decision, many people in Colorado may wonder why the legislature has had such difficulty drafting obscenity legislation acceptable to all three branches of government. The following story of one legislative debate is paradigmatic of the problems the legislature has faced with the obscenity issue.

During the 1976 session, the legislature considered several approaches to outlawing obscenity[9] in the wake of the Colorado Supreme Court's decision in *People v. Tabron*,[10] which had declared the prior obscenity statute unconstitutional for failure to comply with the *Miller* standards. Republican Representative Sam Zakhem introduced a severe bill[11] making the promotion of obscenity a Class 4 Felony. When his bill was not favorably reported from

1. S. 450, 52d Gen. Assembly, 1st Reg. Sess. (1979), vetoed by the Governor May 20, 1979 (veto sustained by the House, 1979 Colo. H.J. 2298).

2. People v. New Horizons, Inc., 616 P.2d 106 (1980); People v. Tabron, 190 Colo. 149, 544 P.2d 372 (1975).

3. S. 447, 1977 Colo. Sess. Laws 982, repealed the 1976 obscenity statute enacted by H.B. 1272, 50th Gen. Assembly, 2d Reg. Sess. (1976).

4. COLO. REV. STAT. §§ 18-7-101 to -106 (Supp. 1981).

5. COLO. REV. STAT. §§ 18-7-501 to -504 (Supp. 1981).

6. *See infra* notes 106, 213, and accompanying text.

7. 413 U.S. 15 (1973).

8. *Id.* at 23-24. For a discussion of these guidelines see *supra* notes 50-54 and accompanying text.

9. H.B. 1116, H.B. 1197, and H.B. 1199, 50th Gen. Assembly, 2d Reg. Sess. (1976).

10. 190 Colo. 149, 544 P.2d 372 (1975). *See infra* notes 72-75 and accompanying text.

11. H.B. 1197, 50th Gen. Assembly, 2d Reg. Sess. (1976), 1976 Colo. H.J. 220.

committee, Zakhem vowed: "The battle is not over; I'm going to try to put the teeth back in that bill."[12]

During a floor debate on the alternative bill,[13] Zakhem proposed an amendment to outlaw "any ultimate sexual act, normal or perverted."[14] Representative Ted Bendelow criticized the Zakhem amendment for making illegal "a husband and wife exercising their normal marital rights in the privacy of their own bedroom."[15] Another representative suggested that Zakhem "should be given a lifetime membership in Zero Population Growth."[16] Zakhem's amendment thereupon went down to defeat by a vote of fifty-seven to one.[17]

Actually the written version of Representative Zakhem's amendment was not as Draconian as his colleagues had feared from his verbal description. But the above vignette illustrates the confusion that can arise when legislators, with differing values and consequently different approaches, try to formulate obscenity legislation. Some Colorado legislators have been primarily concerned with "cracking down" on obscenity; others have focused on technical adherence to the *Miller* standards; while still others have been primarily interested in limiting the possible infringement of freedom of speech by obscenity statutes. The attempts to combine these different values and approaches into one statute through the process of amendment has led to defective statutes. Rather than trying to interpret away the inconsistencies, Colorado courts have been content to strike down an entire statute or excise key portions and let the legislature continue to struggle.

This article will explore the history of obscenity law in Colorado, with special attention to the constitutional defects in past legislation and potential defects in the 1981 statutes now before the Colorado Supreme Court.

II. PRE-*MILLER* OBSCENITY LAW

A. *Statutory*

One remarkable aspect of obscenity law in Colorado is the total lack of litigation in this area before the 1970's, despite the fact that Colorado has had an obscenity statute since 1885.[18] The statute passed in that year prohibited the sale, possession, or exhibition of any "obscene, lewd, or indecent, or lascivious" publication.[19] In an attempt—not entirely successful—to go beyond tautology in its definition, the statute specifically banned "any newspaper, or magazine, containing pictures of nude, or partly nude, men or

12. Denver Post, Feb. 13, 1976 at 3, col. 1. The bill was officially postponed "indefinitely" on Feb. 26, 1976 Colo. H.J. 448.

13. H.B. 1199, 50th Gen. Assembly, 2d Reg. Sess. (1976). Zakhem also co-sponsored another bill, H.R. 1116, which provided that promotion of obscene material to minors was a class I misdemeanor. This bill was killed in committee a month after it was introduced. 1976 Colo. H.J. 123, 448.

14. 1976 Colo. H.J. 588.

15. *Smut Bill Okayed, But Sex Is Still Legal*, Denver Post, Mar. 7, 1976, at 2, col. 4.

16. *Id.*

17. 1976 Colo. H.J. 588.

18. An Act Concerning Offenses Against Public Morality, 1885 Colo. Sess. Laws 172.

19. *Id.*

women, or pictures of men or women in indecent attitudes or positions."[20] Presumably, under this statute a person could be sent to the county jail for up to one year just for selling a picture of a lady or gentleman who, although fully clothed, had adopted an indecent attitude. The same statute had provisions outlawing instruments used for "self-pollution," birth control devices or medicines of any kind, and abortifacients.[21]

This Victorian nightmare, if read out loud in a room of people even minimally versed in constitutional law, probably would provoke laughter. Nevertheless, the basic 1885 statute, including all of the language quoted above, remained the law of Colorado until *1969*.[22] In that year Colorado passed its first modern obscenity statute,[23] which attempted to comply with the prevailing United States Supreme Court authority in the area. The statute defined "obscene" as material that appealed to the "prurient" interest in sex and was "utterly without redeeming social value."[24] Those were two of the elements the Supreme Court had indicated it would look for in state obscenity statutes in the 1966 case, *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*.[25]

B. *Early Cases—Prior Restraints*

The first obscenity case to be decided in Colorado, *People ex rel. McKevitt v. Harvey*,[26] arose under the old statute.[27] The issue in *Harvey* was not the statute's definition of obscenity, but rather the statute's provisions for the search for and seizure of obscene materials.[28] The case involved a two and one-half hour search of the defendant's place of business by Denver police, who were armed with a search warrant.[29] During the search, the officers seized several hundred articles "which *the officers* examined and determined to be obscene."[30]

The material was used as a basis for the granting of a temporary restraining order prohibiting the sale of the material.[31] When, at a later hearing, the judge refused to continue the restraining order as to all of the publications, the district attorney appealed.[32] The defendant cross-appealed, contending that the books were unconstitutionally seized.[33]

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20. *Id.*
21. *Id.*
22. COLO. REV. STAT. § 40-9-17 (1963) repealed at 1969 Colo. Sess. Laws 321, 325.
23. COLO. REV. STAT. §§ 40-28-1 to -10 (1969).
24. *Id.* at § 40-28-1.
25. 383 U.S. 413, 418 (1966). A third element prescribed by the Supreme Court, but not mentioned explicitly in the Colorado statute, was that the material in question must be "patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." *Id.*
26. 176 Colo. 447, 491 P.2d 563 (1971).
27. COLO. REV. STAT. §§ 40-9-17 to -27 (1963).
28. 176 Colo. at 451, 491 P.2d at 564-65.
29. COLO. REV. STAT. § 40-9-17 (1963) (which permits the issuance of search warrants under specified circumstances). *See* 176 Colo. at 448, 491 P.2d at 563.
30. 176 Colo. at 449, 491 P.2d at 563 (emphasis added).
31. *Id.*, 491 P.2d at 564.
32. *Id.*
33. *Id.*

Justice William Erickson, who has authored virtually all the majority opinions dealing with the issue of obscenity, wrote the *Harvey* opinion in which the Colorado Supreme Court held that the statutory scheme authorizing the search warrant was defective. This defect arose because the statute did not provide for an adversary hearing to determine whether the materials to be seized were in fact obscene prior to the search.[34] Instead, the statute impermissibly left the determination of whether materials were obscene to the discretion of police officers,[35] a practice that had been expressly condemned by the United States Supreme Court in *Marcus v. Search Warrant*.[36]

The Colorado court went on to state that any restraint of expression, "which is imposed in advance of a final judicial determination on the merits must be limited to the shortest fixed time period compatible with sound judicial resolution."[37] The court acknowledged the New York injunctive procedure, upheld in the United States Supreme Court case of *Kingsley Books, Inc. v. Brown*,[38] as being an acceptable form of prior restraint. The New York statute provided for "a hearing one day after joinder of issue and for a final decision two days after termination of the hearing."[39]

The Colorado court's acceptance of the *Kingsley* case was not significant at the time of *Harvey* because recent revisions of the Colorado obscenity code had eliminated provisions for restraints on material prior to a judicial determination that the material was obscene.[40] Newer obscenity statutes, however, such as the 1981 law, have gone back to providing for restraints prior to a judicial determination of obscenity.[41] The procedure set forth in the 1981 statute appears, in some respects, to comply with the New York procedure approved in *Harvey* and *Kingsley*.[42] Nevertheless, one subsection of the 1981 statute provides for temporary restraining orders in "exigent circumstances" if the underlying action is "commenced on the earliest possible date."[43] This provision may run afoul of the holding in *Harvey* that prior restraints must be limited to the "shortest *fixed* time period compatible with sound judicial resolution."[44]

The *Harvey* case ruled out searches as means for gathering evidence for obscenity prosecutions until an adversary hearing has been held and the materials have been adjudged to be obscene.[45] Law enforcement officers can

34. *Id.* at 450, 491 P.2d at 564 (citing A Quantity of Books v. Kansas, 378 U.S. 205 (1964)).

35. 176 Colo. at 451, 491 P.2d at 565.

36. 367 U.S. 717 (1961). In *Marcus* the Court held that pornography could not be dealt with as other items of "contraband" during a search. *Id.* at 730-31.

37. 176 Colo. at 150, 491 P.2d at 564 (citing Freedman v. Maryland, 380 U.S. 51 (1965)).

38. 354 U.S. 436 (1957).

39. *Harvey*, 176 Colo. at 452, 491 P.2d at 565. Joinder of issue would occur in these cases when the defendant answers the complaint for injunctive relief. BLACK'S LAW DICTIONARY 750 (rev. 5th ed. 1979).

40. *Harvey*, 176 Colo. at 452, 491 P.2d at 565. The court discussed the changes brought about by COLO. REV. STAT. § 40-7-105 (1971), which provided for injunctive relief only after the material in question had been determined obscene by means of a criminal proceeding in which someone was convicted for promoting it. *Id.*

41. COLO. REV. STAT. § 18-7-103 (Supp. 1981).

42. *See id.* at § 18-7-103(5).

43. *Id.* at § 18-7-103(3).

44. 176 Colo. at 451, 491 P.2d at 564 (emphasis added).

45. *Id.*, 491 P.2d at 565.

otherwise acquire such evidence by purchasing obscene material from its purveyors or by subpoenaing the material. It was the subpoena procedure that was challenged in *Houston v. Manerbino*,[46] which was the next recorded obscenity case in Colorado. In that case, the district attorney submitted to the court a policeman's affidavit that described in minute detail sexual acts being portrayed in films exhibited by the defendant, who was charged with violating the obscenity statute.[47] The affidavit served as the basis for the issuance of a subpoena requiring the defendant to produce the films for the purpose of an adversary hearing.[48]

The Colorado Supreme Court held that such a subpoena was not an impermissible prior restraint, because "[s]ome means had to be devised to obtain and preserve the moving pictures for the purpose of conducting an adversary hearing to determine whether the films were obscene as a matter of law."[49]

III. The Determination of Obscenity as a Matter of Law

A. Miller v. California

The Burger court's major contribution to obscenity law, *Miller v. California*,[50] was designed to make the regulation of obscenity easier by providing "concrete guidelines" for state statutes.[51] The decision did not have that effect in Colorado.

The Court in *Miller* tried to establish guidelines which would ensure that obscenity laws could regulate only "hard core" pornography.[52] For material to be denominated as such, a trier of fact would have to decide, according to *Miller*, that:

> (a) [T]he average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . .
>
> (b) [T]he work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . . .
>
> (c) [T]he work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[53]

The *Miller* decision went on to set forth examples of the types of depictions that could be prohibited under part (b) of the above standard:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the

46. 185 Colo. 1, 521 P.2d 166 (1974).
47. *Id.* at 4, 521 P.2d at 167.
48. *Id.* at 5, 521 P.2d at 167.
49. *Id.* at 8, 521 P.2d at 169.
50. 413 U.S. 15 (1973).
51. *Id.* at 29.
52. *Id.*
53. *Id.* at 24.

genitals.[54]

B. *The First Post-*Miller *Decision*

In *People v. Berger*,[55] the Colorado Supreme Court had its first opportunity to examine an obscenity prosecution in light of the *Miller* standards. The case involved an owner of a Colorado Springs magazine exchange who was convicted of promoting obscenity.[56] The defendant sold a police officer magazines that the court described as follows:

> The photographs contained in the magazines depict nude male and female models posed in various positions. Although the magazines portray male and female genitalia, none of the photographs depicts sexual intercourse, masturbation, fellatio, cunnilingus, or other explicitly sexual conduct. In addition to the photographs, all of the magazines, except one, contained literary articles in the form of short stories comparable to those found in present day "confession" type magazines.[57]

The statute underlying this prosecution was essentially the same statute that the court overturned as unconstitutional two years later in *People v. Tabron*.[58] But the court avoided the constitutional issue in *Berger* by relying on the principle enunciated one month earlier in *Houston v. Manerbino*, that the question of whether materials were obscene was in the first instance a matter of law for the court to decide.[59] Focusing on a statement in *Miller* that states could prohibit only patently offensive "hard core" sexual conduct, the court in *Berger* stated: "In our view, while the photographs depict male and female genitals in a non-turgid state, they do not reveal any form of sexual conduct which could be categorized as 'hard core' pornography or which would be patently offensive to most people."[60] Thus, the court found the magazines to be not obscene as a matter of federal constitutional law, and did not have to reach the question of whether the statute complied with the *Miller* test.[61] By describing the threshold point in the test as being turgidity versus limpness of genitals, however, the court in *Berger* apparently ignored the comment in the *Miller* opinion that a state statute could regulate under part (b) of the standard "lewd exhibition of the genitals."[62]

Nevertheless, the *Berger* court's intentions in setting up such a standard can be better understood from the following comment: "In fact, a number of magazines on today's news stands which appeal to large segments of the community exhibit photographs of the nude human body which are comparable to those contained in the seven magazines which provide the basis for

54. *Id.* at 25.
55. 185 Colo. 85, 521 P.2d 1244 (1974).
56. *Id.* at 86, 521 P.2d at 1244.
57. *Id.* at 87, 521 P.2d at 1245.
58. 190 Colo. 149, 544 P.2d 372 (1976). *See infra* notes 72-75 and accompanying text.
59. *Berger*, 185 Colo. at 88, 521 P.2d at 1245 (also citing Jacobellis v. Ohio, 378 U.S. 184 (1964)).
60. 185 Colo. at 89, 521 P.2d at 1246.
61. *Id.*
62. *Miller*, 413 U.S. at 25.

the charges in this case."[63]

The court in *Berger* seemingly wanted to ensure that popular "centerfold" magazines, such as *Playboy*, *Penthouse*, and *Cosmopolitan*, are not subject to prosecution in Colorado.

IV. THE COLORADO CONSTITUTION AND OBSCENITY

While basing its holding on the first amendment to the federal Constitution as interpreted by the United States Supreme Court, the Colorado court in *Berger* made the following thought provoking statement:

> In order to find that the materials are obscene as a matter of law and capable of supporting a criminal prosecution, we must find not only that the obscenity standards of the statute, as construed under the First Amendment, are met, but also that there has been some abuse of freedom of speech, as envisioned under the broader protective standard of Article II, Section 10 of the Colorado Constitution.[64]

The breadth of the Colorado Constitution's protection of free speech can be seen in the language of article II, section 10:

> No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.[65]

It should be noted that the Colorado Constitution states the right in positive terms, that "every person *shall be free* to speak, write, or publish *whatever* he will *on any subject*,"[66] while the United States Constitution's proscription is stated in the negative, "Congress shall make no law . . . ."[67]

The Colorado Constitution speaks of liability for the abuse of freedom of speech, but it is clear from the context that the framers saw abuse as occurring primarily in the form of slanderous speech and libelous writings. A credible argument can thus be advanced that obscenity is protected expression under the Colorado Constitution. Nonetheless, while the Colorado Supreme Court has declared that the state constitution provides broader protection to free speech than its federal counterpart, there are no Colorado decisions in the area that significantly conflict with federal first amendment law.

After the comment in *People v. Berger*, the court has never again referred to the potential of article II, section 10 of the Colorado Constitution to give broader protection to sexually explicit materials.[68] Furthermore, the chances of the court unequivocally declaring obscenity to be protected speech are

63. 185 Colo. at 89, 521 P.2d at 1246.
64. *Id.* at 89, 521 P.2d 1245-46.
65. COLO. CONST. art. II, § 10.
66. COLO. CONST. art. II, § 10 (emphasis added).
67. U.S. CONST. amend. I.
68. *See, e.g.*, People v. Tabron, 190 Colo. 149, 544 P.2d 372 (1976).

remote. The justices surely recognize that such a decision would probably be overturned by the voters either through the removal of justices from office[69] or the enactment of a constitutional amendment through the referendum process.[70] If courts do indeed watch the election returns, the Colorado court must have taken notice of recent events in California, where that state supreme court's interpretation of the California Constitution as prohibiting the death penalty was promptly overruled by the voters.[71]

V. SATISFYING THE *MILLER* STANDARDS

The next major case in Colorado obscenity law was *People v. Tabron*,[72] a 1976 supreme court decision that declared the state's obscenity statute to be unconstitutional for its failure to comply with the *Miller* standards. The statute at issue[73] had been passed in 1971, two years before the *Miller* case was decided. Therefore, this statute was drafted to comply with the then-prevailing federal constitutional standards enunciated in the *Memoirs* case.[74] In reviewing the conviction of a defendant who had exhibited the film "Deep Throat"[75] in a public theater, the Colorado Supreme Court in *Tabron* discussed the following aspects of the *Miller* standards.

A. *Lacking serious literary, artistic, political, or scientific value*

One major change made by *Miller* was that obscenity was no longer defined to be "utterly without redeeming social value," as in the *Memoirs* test, but rather had to "[lack] serious literary, artistic, political, or scientific value."[76] The court in *Tabron* ruled that the Colorado statute's use of the discarded *Memoirs* test was "[t]he most apparent defect" in its definition of obscenity.[77] The *Tabron* court recognized the argument that a state should be free to adopt the "utterly without redeeming social value" test because that test presents a heavier burden for the state to meet than the standard contemplated by *Miller*. Nevertheless, the court held that its approval of the old standard would deprive a defendant who may have relied on the new *Miller* standard of "fair warning that his action, when committed, constituted a crime."[78]

The *Tabron* court ignores the point that the *Memoirs* standard was rejected in *Miller* precisely because it placed on the prosecution "a burden

69. COLO. CONST. art. VI, § 25.

70. *Id.*, art. XIX, § 2.

71. *See* People v. Anderson, 6 Cal. 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 988 (1972), overruled by popular enactment of CAL. CONST. art. I, § 27, on Nov. 7, 1972.

72. 190 Colo. 149, 544 P.2d 372 (1976).

73. COLO. REV. STAT. § 40-7-101 (1971).

74. 383 U.S. 413 (1966). *See supra* notes 23-25 and accompanying text.

75. 190 Colo. at 151, 544 P.2d at 372. Rather than trying to compel the defendant to produce the film by means of a subpoena duces tecum, the prosecutors acquired from the Los Angeles Police Department a videotape of "Deep Throat" that had been edited differently from the version the defendant was showing. *Id.*, 544 P.2d at 372-73. The court indicated in dicta that the videotape had been admitted into evidence without a proper foundation. *Id.*, 544 P.2d at 373.

76. Miller v. California, 413 U.S. 15, 24 (1973).

77. 190 Colo. at 157, 544 P.2d at 378.

78. *Id.* at 158, 544 P.2d at 378.

virtually impossible to discharge under our criminal standards of proof."[79] In 1977, the United States Supreme Court approved an Illinois statute that retained "the *stricter Memoirs* formulation of the 'redeeming social value' factor."[80] Thus, states were free, despite *Miller*, to retain the stricter *Memoirs* test to assess the societal value of obscene materials. The Colorado court in *Tabron* was not justified in its concern that a defendant have notice of the standard, because when a defendant has notice of a stricter standard, *a fortiorari* he has notice of a less strict standard.

The 1981 Colorado statute does comply with the *Miller* standard that to be obscene, material must "[lack] serious literary, artistic, political, or scientific value."[81] There was testimony, however, in Colorado House committee hearings on the enacting bill that pointed up the limited usefulness of this part of *Miller* test.[82] The House State Affairs Committee heard testimony from Reverands Moore and Mahoney, both ministers of the Church of World Peace, that the members of their church use pornographic literature and "obscene" devices, both proscribed by the 1981 statute, in their worship services. According to the tenets of the Church of World Peace, "sexual energy is a profound religious force." Reverend Moore said he believed the 1981 statute discriminated against the religious practices of his church and in favor of the Judeo-Christian moral code.[83]

The committee members seemed somewhat nonplussed by this testimony, one legislator asking if the ministers were using the term "church" rather "loosely."[84] Reverend Mahoney replied that his group had been recognized as a church by the Internal Revenue Service.[85]

The above exchange may appear comical, but one serious issue raised is whether the *Miller* standard might be too limited, by protecting only prurient material that has value in four disciplines: art, science, literature, and politics. The absence of "religion" in this list may have implications arising out of the free exercise clause of the first amendment as well as the free speech clause.[86]

B. *Specifically Defined Conduct*

The second shortcoming of the Colorado statute, according to the court in *Tabron*, was its failure to comply with part (b) of the *Miller* standard, which said that a statute could only prohibit depictions or descriptions of sexual conduct that were "specifically defined by the applicable state law."[87] The pertinent part of the Colorado statute defined an obscene work as one

79. 413 U.S. at 22.

80. Ward v. Illinois, 431 U.S. 767, 773 (1977) (emphasis added).

81. COLO. REV. STAT. § 18-7-101(2)(c) (Supp. 1981).

82. *Colorado House State Affairs Committee Hearings on S.B. 38*, House Committee Room F, Apr. 14, 1981, 1:48-2:50 P.M. (available at the state archives on tape) [hereinafter cited as *House Hearings*].

83. *Id.*

84. *Id.*

85. *Id.*

86. *But see* Reynolds v. United States, 98 U.S. 145 (1878) (polygamy not protected under free exercise clause).

87. 413 U.S. at 24.

that "predominantly appeals to prurient interest, i.e., a lustful or morbid interest in nudity, sex, sexual conduct, sexual excitement, excretion, sadism, masochism, or sado-masochistic abuse . . . ."[88] The *Tabron* court commented: "Given their plain and ordinary meaning, the words 'nudity, sex, sexual conduct, sexual excitement . . . sadism, masochism, or sado-masochistic abuse,' are not representative of the specificity contemplated by the Supreme Court in *Miller*."[89]

The court arrived at this conclusion by comparing the language of the Colorado statute to the examples given in the *Miller* opinion of what a state statute could define for regulation under part (b) of the standard: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[90]

In spite of *Tabron's* specific disapproval of the use of the terms "sadism" and "masochism," the 1981 Colorado statute has again included those terms in its definitional section.[91] Since the Colorado legislature has twice suffered the embarrassment of having its obscenity enactments struck down by the state supreme court, it is difficult to understand why the legislature has included language in a new statute that has been specifically disapproved by that court. Clues as to the origin of this anomaly may be seen in the legislative history of Senate Bill 38, which resulted in the current law.[92]

Republican Senator Ted Strickland, the prime sponsor of Senate Bill 38 and of much of the state's obscenity legislation in recent years, assigned the drafting of the 1981 statute to a group headed by Bob Miller, former Greeley District Attorney and now United States Attorney for Colorado.[93] Mr. Miller apparently modeled the Colorado legislation after the Texas obscenity statute,[94] the constitutionality of which he said had been upheld by the United States Supreme Court in *Crystal Theaters v. Wade*.[95] The case Mr. Miller referred to, however, was a memorandum decision involving a denial of stay, not a decision on the merits of the Texas statute. Indeed, at the time of the committee hearings, the only federal authorities upholding the constitutionality of the Texas statute were the memorandum decisions of two federal district courts that were affirmed in part by the Fifth Circuit Court of Appeals in *Red Bluff Drive-In, Inc. v. Vance*[96] on June 23, 1981, *after* the Colorado statute had been passed. The *Red Bluff* decision upheld the inclusion of

88. COLO. REV. STAT. § 40-7-101(1) (1971).

89. 190 Colo. at 159, 544 P.2d at 379.

90. 413 U.S. at 25.

91. COLO. REV. STAT. § 18-7-101(2)(b)(II) (Supp. 1981).

92. 1981 Colo. Sess. Laws 998.

93. *Colorado Senate Affairs Comm. Hearings on S. 38*, Senate Committee Room 320 E, Feb. 24, 1981, 9:18 to 10:37 A.M. (available at the state archives on tape) [hereinafter cited as *Senate Hearings*].

94. TEX. PENAL CODE ANN. §§ 43.21 to -.23 (Vernon 1974 & Supp. 1982).

95. 444 U.S. 959 (1979) (mem).

96. 648 F.2d 1020 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1264 (1982). There was brief mention of the Texas statute in Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (per curiam), a case invalidating the use of Texas injunctive procedures to prevent the future showing of allegedly obscene motion pictures. Justice White remarked in a footnote to his dissenting

"sadism" and "masochism" in the definitional parts of the statute, but found several other portions of the Texas statutory scheme "questionable," and invoked the abstention doctrine to await state court decisions that might constitutionally construe those provisions.[97]

In upholding the inclusion of "sadism" and "masochism,"[98] the *Red Bluff* court relied on the 1977 Supreme Court decision of *Ward v. Illinois*.[99] Ironically, the Supreme Court in *Ward* upheld[100] the constitutionality of an Illinois obscenity statute that had wording nearly identical to that of the Colorado statute struck down in *Tabron*; the statute was approved primarily because the supreme court of Illinois had construed the statute in such a way as to comply with *Miller*.[101]

The defendant in *Ward* asserted that sado-masochistic materials could not be constitutionally proscribed because they were not expressly included within the examples *Miller* gave to explain part (b) of its standard.[102] Justice White, writing for the Court, replied, "but those specifics were offered merely as 'examples' . . . and . . . 'were not intended to be exhaustive.' "[103] Justice White went on to say, "[t]here was no suggestion in *Miller* that we intended to extend constitutional protection to the kind of flagellatory materials that were among those held obscene in *Mishkin v. New York* . . . ."[104]

The Colorado trial court relied on *Ward v. Illinois* in upholding the terms "sadism" and "masochism" as used in the 1981 statute.[105] But the Colorado Supreme Court may adopt the reasoning of Justice Stevens, who dissented in *Ward v. Illinois* because he believed the *Ward* majority improperly loosened the tight reins of specificity with which *Miller* had harnessed state obscenity regulation.[106] Of course, the potential constitutional infirmity in the 1981 statute could have been avoided if the drafters had adequately considered Colorado case law rather than relying solely on the Texas statute as their blueprint.

C. *Community Standards*

One of the major changes in the law of obscenity made by the Burger Court in *Miller* was the abandonment of the holding in *Jacobellis v. Ohio*[107] that the community standard must be national in scope.[108] The first prong of the *Miller* guidelines states that whether material is obscene must be judg-

opinion, "[s]ection 43.21, in turn, tracks nearly verbatim the *Miller* guidelines." 445 U.S. at 321 n.1.

97. 648 F.2d at 1027-36.
98. *Id.* at 1027.
99. 431 U.S. 767 (1977).
100. *Id.* at 770.
101. *Id.* at 775.
102. *Id.* at 773.
103. *Id.* (citing Hamling v. United States, 418 U.S. 87, 114 (1974)).
104. *Id.* (citing Mishkin v. New York, 383 U.S. 502, 505-10 (1966)).
105. People v. Seven Thirty-Five East Colfax, Inc., No. 81CV5779 (Denver Dist. Court, Mar. 15, 1982), *appeal docketed*, No. 82SA212 (Colo. Sup. Ct. May 4, 1982).
106. 431 U.S. at 777-82 (Stevens, J., dissenting).
107. 378 U.S. 184 (1964).
108. *Id.* at 195.

ed with reference to " 'the average person applying contemporary community standards.' "[109] The Court thus stated:

> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. . . . People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.[110]

In *People v. Tabron*,[111] the Colorado Supreme Court noted that the *Miller* decision had not given much guidance as to what the boundaries should be for the localized community standard.[112] In the companion case to *Tabron, People v. Tabron (II)*[113], the Colorado Supreme Court decided that a statewide community standard was required.

> It is fundamentally unfair that any person would be called upon to undergo a trial that would entail criminal penalties for the violation of a state obscenity statute without knowing what the standard is that will determine his guilt or innocence. The random decision of a judge or jury cannot be the standard, and the state statute should not be construed in a different manner in Denver, Littleton, Grand Junction, Colorado Springs, and Aspen.[114]

The court in *Tabron II* seemed to be concerned about equal protection of the law for defendants and uniformity of interpretation for courts. The Colorado Supreme Court's agreement with the *Miller* opinion that "a national standard would be an exercise in futility,"[115] however, is itself an exercise in self-delusion. A statewide standard for Colorado is necessarily an amalgam of the attitudes toward obscenity ranging from Boulder college students and the Capitol Hill denizens to the possibly more conservative citizens of rural areas and the suburbs. Thus, Colorado's spectrum of views on the subject of obscenity is to some extent a microcosm of the nation's views as a whole. The true "exercise in futility" may ultimately be the Burger Court's irrational replacement of a hypothetical, abstract nationwide standard with a local standard that most of the states are interpreting to be an equally hypothetical, abstract statewide standard.[116]

D. *The Objectionable Work Taken as a Whole*

Both prongs (a) and (c) of the three prong *Miller* standards[117] emphasized that an objectionable work must be considered in its entirety in making

109. 413 U.S. at 24 (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)).

110. 413 U.S. at 32-33 (citations omitted).

111. 190 Colo. 149, 544 P.2d 372 (1976).

112. *Id.* at 157, 544 P.2d at 377.

113. 190 Colo. 161, 544 P.2d 380 (1976). *Tabron* and *Tabron II* involved prosecution of the same defendant; however, in the second case the issue was defendant's exhibition of the film "Behind the Green Door."

114. *Id.* at 162-63, 544 P.2d at 381.

115. *Id.* at 162, 544 P.2d at 381.

116. The Colorado court noted in *Tabron II* that it was joining a number of other state courts that had adopted statewide community standards. *Id.* at 163, 544 P.2d at 381.

117. 413 U.S. at 24. *See supra* note 53 and accompanying text.

the determination of whether it is obscene. This principle was first promulgated in 1957 in the fountainhead case of *Roth v. United States*.[118] *Roth* rejected the common-law view, which had developed from the 19th century English case of *Regina v. Hicklin*,[119] that a work could be judged obscene based on an examination of isolated passages and the effect those passages might have on a particularly susceptible reader.[120] *Roth* found that such a test might encroach on first amendment freedoms by encompassing materials that, taken as a whole, deal with sex in a legitimate manner.[121]

In *People v. New Horizons, Inc.*,[122] the Colorado Supreme Court struck down the 1977 Colorado obscenity statute for violating the *Miller* requirement that obscenity be determined by considering objectionable material in its entirety. Although the statute included the "taken as a whole" language in two appropriate places in the definition of "obscene material,"[123] the Achilles heel of the statute was in its definition of "material": " 'Material' means any physical object, facsimile, recording, transcription, pictorial representation, motion picture, or reproduction . . . *but does not include the printed or written word*."[124]

The court reasoned that since "material" did not include the printed word, a jury examining a book or magazine with both pictures and text could consider only the pictures as being potentially obscene.[125] Thus, "the pictures could be declared obscene and the entire magazine banned under the statute without reference to whether the included text or other articles imbued the magazine with serious literary, artistic, political, or scientific value."[126]

The court in *New Horizons* recognized that this provision was designed to protect free speech by immunizing unillustrated literature from censorship. The court, however, declined to construe the statute so as to give effect to the legislative intent.[127]

The legislative history behind this particular blunder reveals the difficulty in passing constitutional obscenity legislation. In 1976, the legislature was faced with the task of drafting a new obscenity statute in the wake of the Colorado Supreme Court's decision in *People v. Tabron*.[128] There was still a Democratic majority in the House of Representatives as a consequence of the Watergate landslide in 1974. The voices of moderation prevailed, resulting in an obscenity statute that outlawed the promotion of all hard-core pornography to children and yet outlawed only live sex performances and sadomasochistic materials with respect to adults.[129] The 1976 statute also

118. 354 U.S. 476 (1957).
119. 3 Q.B. 360 (1868), *cited in* Roth v. United States, 354 U.S. 476, 489 (1957).
120. 354 U.S. at 489.
121. *Id.*
122. 616 P.2d 106 (Colo. 1980).
123. COLO. REV. STAT. § 18-7-101(1)(b) (Supp. 1981).
124. *Id.* at § 18-7-101(5) (emphasis added).
125. 616 P.2d at 110.
126. *Id.*
127. *Id.*
128. 190 Colo. 149, 544 P.2d 372 (1976).
129. 1976 Colo. Sess. Laws 555.

contained a provision exempting the printed or written word from its definition of "material."[130]

The 1976 statute was never litigated at the appellate level, because the Republicans regained control of the legislature during the 1977 session. As a result, the 1976 statute was repealed in favor of a more restrictive law that outlawed the promotion of a broader range of obscene materials to adults.[131] Unlike the 1976 bill, the original version of the 1977 bill did not contain the exemption for the written or printed word,[132] but Democratic Representative Wayne Knox added the exemption as an amendment in the House.[133] The Senate did not concur in the House amendments and a conference committee was appointed. The majority report recommended that the House withdraw the Knox amendment,[134] while the minority report, authored by Senator Ted Strickland and Representative Ken Kramer, recommended that the Senate accept the Knox amendment.[135] The House eventually adopted the minority report of the conference committee, repassed the bill,[136] and the Senate conceded to this decision.[137]

Thus, through the process of compromise and consensus, an element was introduced into the bill that conflicted with the original purpose of the redrafting process, which was to create an obscenity statute in compliance with the *Miller* standards.

E. *Material Must Be Patently Offensive*

Included in both part (b) of the *Miller* test and in the *Miller* "examples" for part (b) is the concept that material must be "patently offensive" to be obscene.[138] The 1981 Colorado obscenity statute, modelled after the Texas obscenity law, defines "patently offensive" as "so offensive on its face as to affront current community standards of *decency*."[139]

130. *Id.* at 556. According to Rep. Wayne Knox, it was Republican Don Friedman who originally suggested this provision be included, upon the recommendation of booksellers. Interview with Wayne Knox, State Rep. of Denver (Apr. 23, 1982).

131. 1977 Colo. Sess. Laws 982. The sponsors of the 1977 bill were, *inter alia*, Sens. Ted Strickland and Arch Decker (then a Democrat, and Republican candidate for Congress in the first Congressional district in 1982); Reps. Sam Zakhem and Ken Kramer (now U.S. Congressman, fifth district). According to Rep. Wayne Knox, the crusade to pass a tougher law may have been in part sparked by a comment purportedly made by Art Schwartz, a noted defense attorney in the field of obscenity law, that the 1976 law "legalized pornography." Interview with Wayne Know, State Rep. of Denver (Apr. 23, 1982).

132. S. 447, 51st Gen. Assembly, 1st Reg. Sess. (1977).

133. 1977 Colo. H.J. 1296, amend. 3.

134. 1977 Colo. H.J. 2020.

135. 1977 Colo. H.J. 2081-82.

136. 1977 Colo. H.J. 2090-91. Rep. Knox voted against the bill despite the acceptance of his amendment. *Id.* He said in an interview that he felt there were other constitutional problems with the bill, and that the Colorado Supreme Court had just decided to focus on that particular defect. Knox also criticized Sen. Strickland for getting obscenity legislation assigned to the state affairs committee instead of the judiciary committee, where, according to Knox, a more competent analysis of the constitutional ramifications of bills could be made. Interview with Wayne Knox, State Rep. of Denver (Apr. 23, 1982).

137. 1977 Colo. Sen. J. 2250.

138. 413 U.S. at 24-25.

139. COLO. REV. STAT. § 18-7-101(4) (Supp. 1981) (emphasis added). *See* TEX. PENAL CODE ANN. § 43.21 (a)(4) (Vernon Supp. 1982).

The Fifth Circuit Court of Appeals, reviewing the constitutionality of the Texas law in *Red Bluff Drive-In, Inc. v. Vance*,[140] found this definition to be questionable because of language in *Miller* and another Supreme Court case, *Smith v. United States*.[141] The court in *Red Bluff* indicated that obscenity should be judged with reference to the community's standards of *tolerance* rather than the community's standards of *decency*.[142] The Fifth Circuit commented that "the line between protected expression and punishable obscenity must be drawn at the limits of a community's tolerance rather than in accordance with the dangerous standards of propriety and taste."[143]

The Fifth Circuit decided to abstain from declaring the Texas statute unconstitutional in order to give state courts the opportunity to interpret the offending language in a manner consistent with constitutional standards.[144] The distinction drawn by the Fifth Circuit, however, may not rise to constitutional significance because that court overlooked the fact that a jury instruction approved in the *Miller* case referred to community standards of "decency," though the constitutional ramifications of that term were not included in the *Miller* Court's discussion of the instruction.[145]

F. *Obscenity in the Context of Verbal Assault*

In the Colorado case of *People v. Weeks*[146] a defendant was charged with violating the state telephone harassment statute[147] by making obscene telephone calls.[148] The trial court dismissed the charges, accepting defendant's argument, *inter alia*, that the statute was unconstitutionally applied to defendant because it did not comply with the *Miller* standards in its definition of "obscene."[149] The Colorado Supreme Court ordered the charges reinstated, finding that the requirements of *Miller* "are inapposite when the question is whether the state may prohibit unwanted verbal assaults on a person within the privacy of his own home."[150] The court pointed out that the gravamen of the offense was not the content of the speech, as it would be in an ordinary obscenity prosecution, but rather the manner in which the message was delivered—"the thrusting of an offensive and unwanted communication on one who is unable to ignore it."[151]

VI. THE BROAD DOCTRINES: STANDING, OVERBREADTH, VAGUENESS, AND EQUAL PROTECTION

In the preceding section there was a discussion of the *Miller* guidelines, which are specific to obscenity law. But broader doctrines of first amend-

140. 648 F.2d 1020 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1264 (1982).
141. 431 U.S. 291 (1977).
142. 648 F.2d at 1028-29 (citing Smith v. United States, 431 U.S. 291, 305 (1977)).
143. 648 F.2d at 1029.
144. *Id.*
145. 413 U.S. at 31.
146. 197 Colo. 175, 591 P.2d 91 (1979).
147. COLO. REV. STAT. § 18-9-111(1)(e) (1976).
148. 197 Colo. at 177, 591 P.2d at 93.
149. *Id.* at 180, 591 P.2d at 95.
150. *Id.*
151. *Id.* at 182, 591 P.2d at 96.

ment jurisprudence and constitutional law in general, such as standing, overbreadth, vagueness, and equal protection, can also have an impact on the consideration of the constitutionality of obscenity statutes.

A. *Standing*

In Colorado obscenity cases, the standing doctrine has been invoked when a defendant asserts that a statute is overbroad.[152] The general principle of standing is that a person to whom a statute may be constitutionally applied cannot challenge that statute on the ground that it could be unconstitutionally applied to others in situations not before the court.[153] An exception to this rule, however, is the situation in which a litigant claims that a statute regulating speech is overbroad because it infringes on protected areas of speech as well as prohibits that which it can legitimately prohibit.[154] In those cases, a litigant whose conduct might be prohibited under a more narrowly drawn statute is allowed to challenge the overbroad statute under the assumption that the existence of the statute might "chill" the exercise of those legitimate activities that the statute encompasses.[155] Under this rationale the defendant in *People v. Tabron*,[156] who had exhibited "Deep Throat," a film that probably could have been legitimately banned by a correctly drawn statute, was given standing to challenge the constitutionality of the statute.[157]

A recent Colorado Supreme Court case, *Marco Lounge, Inc. v. City of Federal Heights*,[158] elucidates the court's view of the standing principle. The *Marco* case was unique for several reasons: it was the first time the supreme court decided a case in which the issue was the use of zoning legislation to control obscenity; it was the first time a justice other than William Erickson wrote an opinion in the area;[159] and, it was the first time the obscenity issue split the court.[160]

The case involved a bar with live, nude dancers in Federal Heights.[161] The music stopped when the town board of trustees adopted a zoning ordinance that relegated all nude entertainment, pornography shops, and massage parlors to "E-1 Entertainment" districts.[162] The catch was that no such districts existed, and they could only be created by the voters through the initiative process.[163] With respect to Marco's case, the most significant provision of the ordinance declared: "Nothing herein shall apply to premises li-

152. *E.g.*, People v. Weeks, 197 Colo. 175, 591 P.2d 91 (1979).
153. Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973).
154. *Id.* at 611-12.
155. *Id.* at 612.
156. 190 Colo. 149, 544 P.2d 372 (1976).
157. *Id.* at 152, 544 P.2d at 373.
158. 625 P.2d 982 (Colo. 1981).
159. Justice Lohr authored the majority opinion.
160. Justices Erickson, Dubofsky, and Quinn joined in the majority opinion, while the Justices who are generally regarded as more conservative, Lee, Rovira, and Chief Justice Hodges, dissented.
161. 625 P.2d at 984.
162. *Id.*
163. *Id.*

censed under the State Liquor Code, except that live, nude entertainment shall be prohibited in all such premises."[164] Neither the majority nor the dissenting opinion seemed to appreciate the effect of this provision on the legal theory of the *Marco* case.

Both the majority and the dissenting opinions in *Marco* agreed that the state, pursuant to the powers granted by the twenty-first amendment, may constitutionally prohibit live, nude entertainment in establishments operating with a state liquor license.[165] Both opinions cite the United States Supreme Court decision in *California v. LaRue*[166] as authority for that proposition.

Inexplicably, the dissenting justices stated there was no standing based on the failure of the Marco Lounge to seek enactment of an E-1 entertainment district by initiative before attempting to enjoin enforcement of the ordinance.[167] Justice Rovira stated in his dissent:

> At such time as Marco has attempted to establish an E-1 Entertainment District and the qualified electors of Federal Heights have defeated such a proposal, then it would be in a position to complain of a denial of freedom of speech, and it would have standing to challenge the constitutionality of the zoning ordinance.[168]

Why would Marco Lounge initiate a proposal to create an E-1 entertainment district, unless it planned on serving sarsaparilla instead of liquor? The justices seemed to forget that since the Marco Lounge had a liquor license it was specifically exempted from the zoning provisions of the ordinance and absolutely prohibited from providing nude entertainment.[169]

Thus, in granting standing to Marco Lounge under the loosened standing rules for claims of overbreadth, the majority contradicted the stance the court had taken two years earlier in *People v. Weeks*.[170] In *Weeks* the court denied an obscene caller standing to attack the telephone harassment statute under the following rationale:

> [U]se of the [overbreadth] doctrine is reserved for those defendants whose speech is at the fringes of that activity which the statute is designed to regulate. Those defendants whose speech is central to the interests which the statute seeks to protect and is clearly of a type regulated by the statute in question, cannot attack the statute as overbroad. They must demonstrate that the statute is unconstitutional as applied to them.[171]

Justice Lohr, in a footnote to his majority opinion in *Marco*, questioned whether the above statement was consistent with the overbreadth standing

164. *Id.* (quoting FEDERAL HEIGHTS, COLO. Ordinance § 10-1-5A.4 (Aug. 28, 1976)).
165. 625 P.2d at 986, 989.
166. 409 U.S. 109 (1972). The *LaRue* holding was later solidified in a post-*Marco* case, New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981).
167. 625 P.2d at 991 (Rovira, J., dissenting).
168. *Id.*
169. FEDERAL HEIGHTS, COLO. Ordinance § 10-1-5A.4 (Aug. 28, 1976).
170. 197 Colo. 175, 591 P.2d 91 (1979).
171. *Id.* at 179, 591 P.2d at 94.

doctrine as enunciated by the United States Supreme Court.[172] Indeed, Justice Erickson, in writing the above passage from *Weeks*, cited *Broadrick v. Oklahoma*[173] and a Colorado case, *Bolles v. People*,[174] neither of which supports the *Weeks* proposition.

Aside from the faulty *Weeks* precedent and the failure of the *Marco* court to apply the appropriate portion of the Federal Heights ordinance, the standing issue in *Marco* came down to the applicability of the following statement from *Broadrick v. Oklahoma*: "[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[175] Because Marco's conduct was plainly and legitimately proscribed by the statute, the question of his standing would depend on whether the statute was *substantially* overbroad.[176]

B. *Overbreadth*

1. Zoning Ordinances: *Marco Lounge, Inc. v. City of Federal Heights*

The majority opinion in *Marco Lounge, Inc. v. City of Federal Heights* was correct in finding the zoning ordinances at issue in that case substantially overbroad. For there to be an overbreadth problem, the statute must first be found to encompass protected conduct.[177] The *Marco* majority pointed out that certain forms of live, nude entertainment are protected expression under the first amendment,[178] citing, *inter alia, Doran v. Salem Inn, Inc.*[179] The United States Supreme Court in *Doran* gave "Ballet Africains" as an example of protected nude entertainment.[180]

The zoning ordinance of Federal Heights constituted a blanket prohibition of these protected forms of expression; nude dancing was allowed only in non-existent E-1 districts. The city and the dissenters suggested that the provisions for initiated elections to establish E-1 districts rescued the ordinance from facial invalidity. The majority rejected this contention pointing out that such "place" restrictions had only been upheld when the issuance of licenses or permits for the protected activity was governed by definite standards and the decision was subject to judicial review.[181] The majority stated:

> Putting aside the question whether the time and expense incident to such a procedure would in themselves unconstitutionally burden exercise of First Amendment rights, *see Bayside Enterprises, Inc. v. Carson*, . . . we hold that Marco's right to challenge the zoning plan cannot be conditioned on lack of success in a standardless, unre-

172. 625 P.2d at 986 n.5.
173. 413 U.S. 601 (1973).
174. 189 Colo. 394, 541 P.2d 80 (1975).
175. 413 U.S. at 615.
176. *See infra* text accompanying notes 178-216.
177. NAACP v. Alabama, 377 U.S. 288, 307 (1964).
178. 625 P.2d at 985.
179. 422 U.S. 922 (1975).
180. *Id.* at 933.
181. 625 P.2d at 988 n.10 (citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)).

viewable popular election.[182]

The majority opinion is persuasive as far as it goes. The central question, however, was not fully addressed. It is absurd to suggest that a regulatory scheme is valid which requires an individual to submit his right to engage in constitutionally protected expression to a popular election. As the majority in *Marco* pointed out, the possibility of censorship by a majority vote was the essential reason for enshrining the right of free expression in the Constitution.[183]

2. Obscenity Must Be Erotic: *People v. Tabron*

Some of the weakest overbreadth analysis in Colorado case law can be found in *People v. Tabron*.[184] The court faulted the Colorado obscenity statute not only because it failed to comply with the *Miller* standards, but also because it was "drawn overly broad" in its inclusion of "activities which could be described or depicted in some context other than an erotic one."[185] One of the Colorado court's authorities for the proposition that obscenity must be erotic was *Erznoznik v. City of Jacksonville*.[186] In *Erznoznik*, the United States Supreme Court declared a municipal ordinance unconstitutional that banned nudity on drive-in movie screens that were visible outside the movie premises from a public place. The Supreme Court stated that despite the aim of protecting children, the drive-in ordinance was overly broad because it was not limited to sexually explicit nudity, but would encompass non-erotic nudity such as the naked body of a war victim in a documentary film.[187]

In reaching its conclusion that the Colorado statute regulated non-erotic material, the Colorado court was taking the word "nudity" in the statute's definition of "obscene" out of context. The statute defined as "obscene" that which "predominately appeals to prurient interest, i.e., *a lustful or morbid interest in nudity* . . . ."[188] It is difficult to understand how nudity appealing to lustful interests could be depicted in a non-erotic context.[189]

3. Impingement on Privacy Interests: The 1981 Colorado Statute

The 1981 Colorado obscenity statute prohibits the "promotion" of "obscene devices" as well as obscene publications.[190] An obscene device is defined as "a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital or-

182. 625 P.2d at 988-89 (citing Bayside Enterprises, Inc. v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978)).

183. 625 P.2d at 988.

184. 190 Colo. 149, 544 P.2d 372 (1976).

185. *Id.* at 159, 544 P.2d at 379.

186. 422 U.S. 205 (1975).

187. *Id.* at 213.

188. COLO. REV. STAT. § 40-7-101(1) (1971) (emphasis added).

189. Yet Justice Erickson so prefers this analysis that he once again employed it in a companion case to *Tabron*, Menefee v. Denver, 190 Colo. 163, 166, 544 P.2d 382, 383 (1976), which declared the Denver municipal obscenity ordinance unconstitutional.

190. COLO. REV. STAT. § 18-7-102(2)(a)(I) (Supp. 1981).

gans."[191] To promote an obscene device is to "manufacture, issue, sell, *give, provide*, lend, mail, deliver . . . or *to offer or agree to do the same*."[192]

The Fifth Circuit, interpreting the Texas progenitor of Colorado's statute in *Red Bluff Drive-In, Inc. v. Vance*,[193] found that the above sections, taken together, appeared overly broad because they swept within their ambit "acts the state cannot criminalize."[194] The Fifth Circuit stated:

> The literal language of the statute forbids the most sensitive and intimate conversations. For example, a husband could be found to have violated the letter of the statute by uttering in the privacy of the marital bedroom a verbal suggestion to procure for his wife one of the commercially available small appliances referred to as vibrators.[195] (Footnote omitted).

The court recognized that this kind of prohibition was inconsistent with the United States Supreme Court decision in *Stanley v. Georgia*,[196] which held that statutes regulating obscenity could not reach into the privacy of the home. The Fifth Circuit in *Red Bluff*, however, abstained from declaring the Texas statute unconstitutional. Instead, the court decided to await a narrowing construction by state courts.[197]

Representative Chris Paulson, a member of the Colorado House of Representatives, expressed concern about the privacy aspects of the Colorado statute in the 1981 House hearings on Senate Bill 38.[198] Paulson later offered the following amendment to the bill,[199] which was accepted and incorporated into the statute: "This section does not apply to a person's conduct otherwise prescribed [sic] by this section which occurs in that person's residence as long as that person does not engage in the wholesale promotion or promotion of obscene material in his residence."[200]

This amendment is an exercise in tautology and to paraphrase, the amendment says: This section does not apply to conduct in your residence as long as you do not engage in the conduct prohibited by this section in your residence. In essence, the section begs the question with respect to the overbreadth of the term "promote," except that it appears to give a blanket exemption for use of obscene desires in the residence.

4. Infringement on Protected Adult Activity: The 1981 "Display" Statute

The obscenity statute modelled after Texas law was not the only legislative activity in this area during the 1981 session. The legislature also suc-

191. *Id.* at § 18-7-101(3).
192. *Id.* at 18-7-101(6) (emphasis added).
193. 648 F.2d 1020 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1264 (1982).
194. *Id.* at 1029.
195. *Id.* at 1029-30.
196. 394 U.S. 557 (1969).
197. 648 F.2d at 1030. *See also* People v. Mizell, No. 82CR1053 (Dist. Ct. 4th Jud. Dist. Oct. 21, 1982) ("promote" found overbroad).
198. *House Hearings, supra* note 82.
199. 1981 Colo. H.J. 1235.
200. COLO. REV. STAT. § 18-7-102(6) (Supp. 1981).

ceeded in enacting a statute to limit childrens' access to obscene material.[201]

The most controversial portion of the statute prohibits the display of sexually explicit materials that are "harmful to children" at "news stands or any other business or commercial establishment frequented by children or where children are or may be invited as part of the general public."[202] The statute defines "harmful to children" as pertaining to those materials that appeal to the "prurient interest in sex of children," that are patently offensive to prevailing standards in the adult community as to *what is suitable for children*, and that are "lacking in serious literary, artistic, political, and scientific value *for children*."[203]

The legislature had attempted to pass similar legislation during the 1978 session, only to have it vetoed by Governor Richard Lamm.[204] In conjunction with his veto, the Governor initiated a voluntary agreement with major vendors of adult magazines to have their distribution outlets keep such magazines behind the counter or otherwise out of the reach of children.[205] The Governor also vetoed the 1981 statute, but this time the legislature overrode the veto by large margins.[206]

According to the Governor's veto message, he was advised by the Attorney General to disapprove the bill because it was unconstitutionally vague and overbroad.[207] The Governor stated that the legislation would "impinge upon and jeopardize the business of quality bookstores, galleries, and even grocery stores which might have one questionable book or magazine among its multitude of other goods and merchandise."[208]

The Governor's point has merit. It is common knowledge that many paperback books and magazines sold in grocery stores, drug stores, and at assorted other locations contain sexual descriptions that many adults would not find suitable for children. Under this statute, such establishments would have to prohibit children from coming in at all or, at a minimum, would have to physically segregate the book and magazine section from the rest of the store, and not allow children to enter this section.[209]

In a lawsuit brought by booksellers to enjoin enforcement of the statute, the Denver district court severed the "display" section from the statute, finding that it was unduly burdensome on booksellers and "chilling" to the "channels of dissemination."[210] In preparing their case for the Colorado Supreme Court, the booksellers can take comfort from the indications in *Marco Lounge, Inc. v. City of Federal Heights* that a majority of the justices on

201. COLO. REV. STAT. §§ 18-7-501 to -504 (Supp. 1981).
202. *Id.* at § 18-7-502(5).
203. *Id.* at § 18-7-501(2) (emphasis added).
204. Message from the Governor, 1981 Colo. H.J. 2263.
205. *Id.*
206. The Senate vote was 27-8 in favor of overriding Governor Lamm's veto of H.B. 1310, 1981 Colo. Sen. J. 2597. The House vote was 47-15 in favor of overriding. 1981 Colo. H.J. 2328.
207. Message from the Governor, 1981 Colo. H.J. 2263.
208. *Id.*
209. *See* Tattered Cover, Inc. v. Tooley, No. 81CV09693, slip op. at 4 (Denver Dist. Ct. Jan. 26, 1982), *appeal docketed*, No. 82SA85 (Colo. Sup. Ct. Mar. 23, 1982).
210. *Id.* at 5.

the supreme court look unfavorably on regulatory schemes that are excessively burdensome on first amendment rights.[211]

The Colorado district court, however, upheld the part of the statute prohibiting the sale of sexually explicit materials to minors,[212] relying on *Ginsberg v. New York*.[213] *Ginsberg* was a United States Supreme Court case holding that states have the power to control the dissemination of certain material to minors even though that same material might involve protected expression if distributed to adults.[214] Also left intact by the Colorado district court was a controversial portion of the statute that prohibits the admission of children to sexually explicit movies without reference to whether they are accompanied by a parent.[215]

C. *Vagueness*

The critical vulnerability of the 1981 obscenity statute appears to be a section that exempts from prosecution "any *accredited* theater, museum, library, school, or institution of higher education."[216] Examining the term "accredited" in the case of *People v. Seven Thirty-five East Colfax, Inc.*,[217] the Denver district court said: "Although this term is frequently mentioned in conjunction with 'schools' it is not a common, or even appropriate term in connection with museums, libraries and theaters."[218] The court found the term unconstitutionally vague,[219] as did the district court judge considering a parallel provision in the "display" statute in *Tattered Cover, Inc. v. Tooley*.[220]

The "accredited" section in the obscenity statute was not in the original bill, but rather, was introduced into the bill by an amendment reminiscent of the fatal defect in the 1979 legislation. Senator Ted Strickland, who offered the amendment,[221] said in an interview that the amendment was offered to protect legitimate concerns and thereby gain uniform support for the bill in the general assembly.[222]

The discussion of this section that took place during the House hearings casts some light on the underlying rationale or lack thereof.[223] Republican Representative James Lee, an attorney, asked Bob Miller, a proponent of the

211. 625 P.2d at 988.

212. Tattered Cover, Inc. v. Tooley, No. 81CV09693, slip op. at 4 (Denver Dist. Ct. Jan. 26, 1982), *appeal docketed*, No. 82SA85 (Colo. Sup. Ct. Mar 23, 1982).

213. 390 U.S. 629 (1968).

214. *Id.* at 637-39.

215. COLO. REV. STAT. § 18-7-502(2) (Supp. 1981).

216. *Id.* at § 18-7-104(1)(b) (emphasis added).

217. No. 81CV5779 (Denver Dist. Ct. Mar. 15, 1982), *appeal docketed*, No. 82SA212 (Colo. Sup. Ct. May 4, 1982). *See also* People v. Mizell, No. 82CR1053 (Dist. Ct. 4th Jud. Dist. Oct. 21, 1982) ("accredited" section struck down as denial of equal protection).

218. *Id.* at 5.

219. *Id.* at 6.

220. No. 81CV90693, slip op. at 6 (Denver Dist. Ct. Jan. 26, 1982).

221. 1981 Colo. Sen. J. 629.

222. Interview with Ted Strickland, State Senator, (Apr. 23, 1982). A legislative drafting office file on the 1977 statute reveals that the word "bona fide" was also considered for use in this type of provision. Sen. Strickland also commented that one substitute for the offending term that was considered, but rejected, was "legitimate."

223. *See House Hearings, supra* note 82.

bill, "[w]hat's the definition of an 'accredited theater?' "[224] Miller replied that he did not know.[225]

Senator Strickland spoke up: "That word was carefully chosen because of the reference to institutions of higher education . . . an accredited theater is part of that institution."[226]

* * *

"You're not talking about commercial theaters?" asked Representative Lee.[227]

"No," Senator Strickland replied.[228]

What is remarkable about this dialogue is that it occurred, and yet no one attempted to resolve the ambiguity in the bill.

D. *Equal Protection of the Law: The Handicapped and the Prohibition of Obscene Devices*

In the case challenging the parallel Texas obscenity statute, one of the plaintiffs, a paraplegic, raised an equal protection claim against the statute's proscription of obscene devices.[229] This plaintiff argued that enforcement of the statute would deny him the constitutional right to a normal sex life.[230] The Fifth Circuit dismissed this argument with the comment that no such constitutional right has been recognized.[231]

The 1981 Colorado statute defines obscene devices as devices "designed or marketed as useful primarily for the stimulation of human genital organs."[232] This language is broad enough, however, to include prosthetic implants and electrode devices designed to aid impotent men. The right of those handicapped by impotence to use such devices, and the concomitant right of persons to sell such devices, should be recognized on the basis of the privacy right enunciated in *Griswold v. Connecticut*[233] and the right of personal autonomy recognized in *Roe v. Wade*.[234]

VII. Obscenity Law and the Relationships Between the Levels and Branches of Government

A. *Levels*

1. Federal-State: The Abstention Doctrine

The abstention doctrine allows federal courts to abstain from exercising

224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. Red Bluff Drive-In, Inc. v. Vance, 648 F.2d 1020, 1028 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1264 (1982).
230. *Id.*
231. *Id.*.
232. Colo. Rev. Stat. § 18-7-101(3) (Supp. 1981).
233. 381 U.S. 479 (1965) (there is a privacy right in connection with birth control devices).
234. 410 U.S. 113 (1973) (struck down an abortion law for infringing on the constitutional right of personal autonomy).

jurisdiction over constitutional challenges to state action if the resolution of state law questions by the state courts might make the federal constitutional questions moot.[235] It is not surprising that in the one federal court encounter with the thorny problem of the constitutionality of a Colorado obscenity statute, this doctrine was invoked. In *Bergstrom v. Ricketts*,[236] an inmate of the Colorado State Penitentiary brought an action alleging that the mail room officer of the penitentiary had failed to deliver him certain books on the grounds that they were obscene.[237] The Board of Corrections had adopted a regulation, pursuant to the 1979 obscenity statute, which banned "obscenity contraband," and the prisoner contended the regulation was invalid.[238] The district court abstained from deciding the constitutionality of the statute. "[W]hen the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily."[239]

2. State-City: Preemption

Pierce v. City and County of Denver[240] involved a suit brought by the manager of a university bookstore against the city to enjoin enforcement of an obscenity ordinance.[241] The city council had moved quickly to adopt a new ordinance in the wake of the invalidation of its previous ordinance in *Menefee v. City and County of Denver*.[242] The Colorado Supreme Court in *Pierce* held that the court's adoption of statewide community standards in *Tabron II* rendered the regulation of obscenity a matter of statewide concern under the Colorado Constitution.[243] Therefore, the city ordinance was invalid because it exceeded the state legislative grant of power.[244]

B. *Branches: Legislative-Judicial*

The judiciary in Colorado has not been inclined to assist the legislature by construing obscenity statutes so as to bring them into compliance with constitutional guidelines; instead the courts have completely invalidated these statutes, forcing the legislature "back to the drawing board."

1. Original Proceeding

One avenue open to the legislature for expediting the "trial-and-error" process that has developed in obscenity legislation is the "original proceed-

235. *See* Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).

236. 495 F. Supp. 210 (D. Colo. 1980).

237. *Id.* at 210. The action was brought under 42 U.S.C. § 1983. The plaintiff asserted that the refusal to deliver the books he purchased violated his first amendment rights.

238. *Id.* at 211.

239. 495 F. Supp. at 212 (quoting City of Meridian v. Southern Bell Tele. & Tele. Co., 358 U.S. 639, 641 (1959)).

240. 193 Colo. 347, 565 P.2d 1337 (1977).

241. *Id.* at 348, 565 P.2d at 1337-38.

242. 190 Colo. 163, 544 P.2d 382 (1976). This was a companion case to People v. Tabron, 190 Colo. 149, 544 P.2d 372 (1976).

243. *See* 193 Colo. at 349, 565 P.2d at 1339; COLO. CONST. art. XX, § 6.

244. 193 Colo. at 350-51, 565 P.2d at 1339-40.

ing." The Colorado Constitution provides: "The supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives; and all such opinions shall be published in connection with the reported decision of said court."[245]

Despite the seemingly mandatory nature of this language, the supreme court has generally resisted giving guidance to the legislature on the grounds that such decisions must be made in the context of a concrete controversy.[246] While formal interrogatories have never been submitted on an obscenity statute, an informed source in the legislature imparted the information that a senior senator of the majority party approached Chief Justice Hodges on the subject informally and has not received an encouraging response.[247]

2. Authoritative Construction

In promulgating new guidelines for state obscenity regulation, the United States Supreme Court was careful to say in *Miller v. California*,[248] that states did not have to meet the guidelines by passing new obscenity statutes.[249] Instead, an authoritative construction could be placed on existing state statutes by state courts thereby incorporating the *Miller* standards.[250] A number of state courts accepted this suggestion.[251]

The Colorado Supreme Court, however, did not. In *People v. Tabron*, the court stated: "What the prosecution urges, under the guise of 'authoritative construction,' is a 'wholesale rewriting' of the Colorado Obscenity Statutes."[252] The court indicated that such wholesale rewriting would amount to a judicial usurpation of legislative power and thus, a violation of the doctrine of separation of powers.[253]

But in *People v. New Horizons, Inc.*,[254] the case involving the 1979 statute and its exemption for the printed word, the court did not have the excuse that authoritative construction of the statute would involve wholesale rewriting. The court could have easily construed the offending provision in accordance with the legislative intent that publications could not be declared obscene on the basis of the printed word alone. The court, however, avoided the issue of construction by declaring "we are bound by the clear language of the statute and must declare it unconstitutional."[255] The stance of the Colorado court seems inconsistent with the United States Supreme Court's

245. COLO. CONST. art. VI, § 3.

246. *See* In Re Interrogatories Propounded By the Senate, 131 Colo. 389, 291 P.2d 1013 (1955).

247. The source asked that neither he nor the senior senator be identified. *See* Note, *Constitutionality of Obscenity Statutes*: People v. New Horizons, 52 COLO. U.L. REV. 575, 580 (1981).

248. 413 U.S. at 24 n.6.

249. *Id.*

250. *Id.*

251. Note, *Constitutionality of Obscenity Statutes*: People v. New Horizons, 52 COLO. U.L. REV. 575, 582 n.44 (1981).

252. 190 Colo. 149, 160, 544 P.2d 372, 379 (1976).

253. *Id.* (quoting Art Theater Guilde, Inc. v. State *ex. rel.* Rhodes, 510 S.W. 2d 258 (Tenn. 1974)).

254. 616 P.2d 106 (Colo. 1980).

255. 616 P.2d at 110.

view as expressed in *Broadrick v. Oklahoma*.[256] According to *Broadrick*, the striking down of an entire statute under the overbreadth doctrine is a remedy that should be used "sparingly and only as a last resort," and instead a "limiting construction" should be employed whenever possible.[257]

3. Severability

Having abandoned any hope of getting the supreme court to authoritatively construe its enactments, legislators have sought salvation in the concept of severability. Senator Strickland expressed his disappointment that the supreme court had failed to sever the offending language in the 1979 statute that exempted the printed word.[258] Strickland emphasized that in the 1981 statute the draftsmen had included two severability clauses, one at the end of the definitional section[259] and one at the end of the entire statute.[260]

Senator Strickland's remarks expose a basic misunderstanding of the canons of statutory interpretation. It is a well-established principle that penal statutes must be strictly construed in favor of those whose interests they adversely affect,[261] and that courts cannot construe a statute in a manner that will criminalize conduct that was previously not criminal.[262] It would have been inconsistent with these principles for the supreme court in *New Horizons* to strike from the 1979 statute the offending language exempting the printed word and thereby create a new class which would be subject to penal sanctions—the purveyors of exclusively narrative pornography.

Senator Strickland is not the only person who failed to recognize these principles. In *Tattered Cover, Inc. v. Tooley*,[263] the district court judge solved the vagueness problem involving the language "accredited theater" in the "display" statute[264] by striking the entire exemption for accredited institutions.[265] Thus, the court extended the reach of the statute. Theoretically, the revised statute would be violated when a college bookstore manager sells a book that depicts sexual matters unsuitable for children to a seventeen-year-old freshman.

The district court judge examining the 1981 obscenity statute has apparently arrived at a more reasonable construction by striking only the word "accredited"[266] from the exemption provision. If this construction is upheld on appeal, the severability clause will not have solved the legislature's prob-

256. 413 U.S. 601 (1973).
257. *Id.* at 613.
258. *House Hearing, supra* note 82.
259. COLO. REV. STAT. § 18-7-101(9) (Supp. 1981).
260. *Id.* at § 18-7-105.
261. Van Gerpen v. Peterson, 620 P.2d 714 (1980).
262. Hamling v. United States, 418 U.S. 87, 115-16 (1974).
263. No. 81CV09693 (Denver Dist. Ct. Jan. 26, 1982), *appeal docketed*, No. 82SA85 (Colo. Sup. Ct. Mar. 23, 1982).
264. *Id.* at 6.
265. COLO. REV. STAT. § 18-7-503 (Supp. 1981).
266. People v. Seven Thirty-five East Colfax, Inc., No. 81CV5779, slip. op. at 5-6 (Denver Dist. Ct. Mar. 15, 1982), *appeal docketed*, No. 82SA212 (Colo. Sup. Ct. May 4, 1982).

lem. The statute will still have to be amended to account for the new possibility that pornographic theaters may qualify under the exemption clause.

VIII. CONCLUSION

The story of obscenity law in Colorado has been one of a legislature that is ill-prepared for the task of drafting constitutional statutes, and a court that is unwilling to do the job for the legislature. As a result, Colorado has not had an enforceable obscenity statute for ten years. In the future, the legislature must avoid the seductive shortcut of selecting another state's law as a model on which to base a new Colorado obscenity statute. Instead, legislators must be sensitive to both Colorado and federal case law in this area and carefully scrutinize any amendments to the original bill.

THE FCC'S MULTIPLE OWNERSHIP RULES AND NATIONAL CONCENTRATION IN THE COMMERCIAL RADIO INDUSTRY *

MICHAEL O. WIRTH, PH.D.**

INTRODUCTION

> The [Federal Communication] Commission has traditionally accorded this rule the highest station among its several multiple ownership regulations. The "seven station" rule is the ultimate multiple ownership regulation, with all other proscriptions and exemptions occurring within the constraints it imposes. Since the adoption of the "seven station" rule in 1953, the Commission has never seen fit to waive this regulation, demonstrating the regard held for the rule's integrity.[1]

From the moment the FCC first imposed an arbitrary upper limit on the number of broadcasting stations that one business entity could own,[2] the Commission's multiple ownership regulation has been a source of controversy.[3] Some authorities argue that the rule is too lenient and a more stringent national concentration standard ought to be imposed.[4] Others contend the Rule is, at best, concerned with the wrong kind of ownership concentration,[5] and at worst, arbitrary and capricious.[6] Regardless of the point of

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1. Further Notice of Proposed Rule Making in Docket No. 20548, 63 F.C.C. 2d 832, 834 (1977).

2. An upper limit of six FM stations to a customer was imposed in 1940. *See* 5 Fed. Reg. 2384 (1940). This was followed by imposing an upper limit of three on prospective television owners. *See* 6 Fed. Reg. 2284 (1941). The television limit was increased to five in 1944. *See* 9 Fed. Reg. 5442 (1944). No formal rules existed for AM stations until the Commission promulgated the 7-7-7 Rule (7-7-5 at the time). *See* Report and Order in Docket No. 8967, 18 F.C.C. 288 (1953). Prior to this an informal upper limit of seven AM stations existed as a result of the FCC's refusal to allow CBS to purchase full interest in an eighth standard broadcast station, KQW, in San Jose. *See* Sherwood B. Brunton, 11 F.C.C. 407 (1946).

3. *See* Howard, *Multiple Broadcast Ownership: Regulatory History*, 27 FED. COM. B.J. 1, 8 (1974) for a brief discussion of NBC's initial problems with the FCC's numeric limits on television. *See also* Editorial, BROADCASTING Aug. 10, 1981 at 98. The most extensive and expensive objection to the Seven Station Rule was lodged by Storer Broadcasting Co. (originally called the Fort Industry Co.). Storer's challenge was turned back, however, by a nearly unanimous Supreme Court decision favoring the FCC. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

4. *See* FCC Network Study Memorandum, *Multiple Ownership and Television*, 1 J. OF BROADCASTING 250, 261 (1957); HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, NETWORK BROADCASTING, H.R. REPORT NO. 1297, 85th Cong., 2d Sess. 659-60 (1958). These provide the FCC Network Study Staff's call for a long run FCC goal of one station per licensee. *See also* H.R. REP. NO. 607, 85th Cong., 1st Sess. 141 (1957).

5. *See* Trask, *The Palace of Humbug—A Study of FCC Policies Relating to Group Ownership of Television Stations*, 22 FED. COM. B.J. 185, 210 (1968). *See* Rosse, Dertouzous, Robinson and Wildman, *Economic Issues in Mass Communication Industries*, 1 FEDERAL TRADE COMMISSION PRO-

view, however, one thing is clear, the FCC has broad and substantial discretion in fashioning ownership regulations.[7]

The result of this extensive discretionary power is that the Commission's ownership decisions are, in most instances, upheld by the courts.[8] Consequently, interested parties must influence Commission ownership policy at its inception if they feel strongly about an issue.[9] Failure to persuade the FCC that a particular view ought to be the "reasonable" view adopted by the Commission, leaves two options: 1) pressure Congress to amend the Communications Act,[10] or 2) wait until the political climate at the Commission becomes more favorable to the interest asserted.

As to the second strategy, the FCC's original Multiple Ownership Proceeding[11] provides a classic example. Ten parties (all broadcasters) filed comments on September 27, 1948.[12] The comments almost uniformly opposed the imposition of arbitrary numeric limits on station ownership by the Commission.[13] The Commission ignored the arguments and instituted the Seven Station Rule.[14] Today, after nearly three decades of waiting, a deregulatory climate exists at the FCC.[15] Commission Chairman, Mark Fowler, recently suggested that it might be a good idea for the FCC to consider the possibility of permitting groups to own more than seven AM radio stations, seven FM radio stations, and seven television stations [TV].[16]

This article will focus on the radio portion of the policy question raised

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CEEDINGS OF THE SYMPOSIUM ON MEDIA CONCENTRATION 40, 188 (1978) [hereinafter cited as Rosse].

6. *See* Brief for Respondent at 25-26, United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) [hereinafter cited as Brief for Respondent]; Comments of National Broadcasting Co. Pursuant to the Federal Communications Commission Multiple Ownership Proceedings in Docket No. 8967 at 18, 20 (Sept. 27, 1948); Comments of the Trans-American Television Corporation On Proposal to Amend the Multiple Ownership Rules in Docket No. 8967 at 27, 43-44 (Sept. 27, 1948).

7. *See* NBC v. United States, 319 U.S. 192 (1943); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978).

8. According to Powe, FCC Determinations of Networking Issues in Multiple Ownership Proceedings, 3 *Federal Communications Commission Network Inquiry Special Staff* 1, 19 (1980), "[w]hatever may be the outer limit of the Commission's authority, there is no indication in the three cases that the Commission has approached it." *Cf.* United States v. Midwest Video Corp., 406 U.S. 649 (1972).

9. Subsequent court review will be totally unsuccessful unless the Commission has utilized an "unreasonable" means of promoting diversity of mass communications sources. FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 795 (1978); Powe, *supra* note 8 at 19.

10. 47 U.S.C. §§ 151-744 (1976 & Supp. III 1979).

11. The reference here is to the FCC's initiation of formal rulemaking, Notice of Proposed Rule Making, 13 Fed. Reg. 5060 (1948).

12. Review of Original FCC Docket No. 8967 (Aug. 6, 1981) (available in National Archives, Suitland, Md.).

13. *Id.*

14. Report and Order in Docket No. 8967, 18 F.C.C. 288 (1953). The industry's arguments although largely ineffective did cause the Commission to increase the number of FM stations that one party could own (from six to seven) and ultimately got the television station limit raised to seven (only five of which could be VHF) in a subsequent proceeding; *see* Report and Order in Docket No. 10822, 43 F.C.C. 2797 (1954).

15. The FCC has moved recently to deregulate cable television, some aspects of radio, and license renewal procedures for radio and TV.

16. *FCC OK's Westinghouse-Teleprompter*, BROADCASTING Aug. 3, 1981 at 29-30.

by Mr. Fowler's suggestion.[17] The issue of whether the FCC's Seven Station Rule should be retained to control national concentration in radio will be addressed. First, a brief history of the Seven Station Rule will be provided. Next, the FCC's rationale for promulgating the Rule will be discussed, and the status of radio group ownership with respect to national concentration issues will be described. The next section will contain a list of policy alternatives which FCC policymakers can consider. The alternatives will be critically evaluated, including the author's policy recommendations and conclusions.

I. HISTORY OF THE SEVEN STATION RULE

The first formal rule promulgated by the FCC limiting the number of commercial stations that could be owned by one entity restricted FM station-ownership to six stations.[18] This 1940 rule was instituted at a time when there were fewer than fifty FM stations on the air.[19] Shortly thereafter (April 30, 1941), the FCC issued a rule which limited national television ownership to three stations.[20] This TV limit was later increased to five in May 1944 as a partial response to an NBC petition requesting that the upper limit be set at seven television stations.[21]

No formal maximum limit on AM station ownership was imposed by the Commission prior to its decision in Docket 8967.[22] However, the FCC's decision in *Sherwood B. Brunton*[23] made clear the Commission's opinion that full ownership of more than seven AM stations nationally is not in the public interest, at least with respect to a powerful national radio network.

On August 19, 1948, the FCC issued a *Notice of Proposed Rule Making* which recommended that a financial entity be limited to ownership of seven AM stations, six FM stations, and five television stations.[24] The rule making was completed on November 27, 1953, when the Commission issued a *Report and Order* limiting ownership to seven AM stations, seven FM stations, and five TVs.[25] The final modification to the FCC-established arbitrary upper

17. Much of the discussion is applicable to a discussion of national concentration in the television industry. However, the obvious differences between these two industries (7,937 licensed commercial radio stations on the air versus 763 TV stations) suggests that they ought to be separated analytically.

18. 5 Fed. Reg. 2384 (1940). According to Howard, *supra* note 3, at 8, the FM standard was contained in Rule 3.228 (now codified at 47 C.F.R. § 73.240 (1981)).

19. Comments of Trans-American Television, *supra* note 6, at 3.

20. 6 Fed. Reg. 2284 (1941). According to Howard, *supra* note 3, at 8, the TV standard was originally issued as Rule 4.77 in 1940 and was applicable to experimental television stations. Rule 4.77 was replaced by Rule 4.226 (now codified at 47 C.F.R. § 73.636 (1981)) when the FCC allowed experimental stations to switch to commercial operation in 1941.

21. 9 Fed. Reg. 5442 (1942). According to Powe, *supra* note 8, at 28, there were only five commercial television stations in operation when NBC made its request.

22. Report and Order in Docket No. 8967, 18 F.C.C. 288 (1953).

23. 11 F.C.C. 407, 412-13 (1946). At the time, CBS already had controlling interest in seven AM stations, six of which were 50,000 watt clear channel stations. Since KQW in San Jose was also a 50,000 watt clear channel station, the FCC's decision in this case would not necessarily have prevented a less powerful entity with a less powerful station lineup from obtaining an eighth station.

24. *See supra* note 11.

25. *See supra* note 22. The Report and Order in Docket No. 8967, 18 F.C.C. 288 (1953) also dealt with the extent of ownership interest which would activate imposition of the promulgated

limits on national station ownership took place in September 1954, when the Commission increased the television limit to seven (provided that only five were VHFs).[26]

II. THE FCC'S RATIONALE FOR THE SEVEN STATION RULE

The Seven Station Rule was established at a time when the communications industry was experiencing rapid change. The television industry was just becoming a meaningful nationwide force.[27] Conversely, the radio industry was on the verge of losing most of its national influence.[28] Larger broadcast interests were uniformly opposed to the rule's limitations.[29] Very little was heard or written concerning the position taken by smaller broadcasters,[30] and Congressional sentiment was mixed.[31]

In light of the countervailing forces present in the regulatory environment, the FCC attempted to effect a "reasonable" compromise with respect to the Seven Station proceeding.[32] The policy objective underlying the Commission's decision was to maximize nationwide broadcast competition (the number of different owners) while minimizing industry disruption.[33]

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limits. Although these limits were set at a low level (one percent), they are outside the concern of this article. The rules as promulgated and as subsequently modified can be found in 47 C.F.R. §§ 73.35 (AM), 73.240 (FM), and 73.636 (TV) (1981).

26. Report and Order in Docket No. 10822, 43 F.C.C. 2797 (1954). This does not suggest that the FCC has been inactive with respect to its concern over concentration of broadcast media. Numerous proceedings have dealt with issues concerning regional and local media concentration. However, with the exception of the FCC's attempt to institute a Top 50 Ownership Rule, 45 F.C.C.2d 1851 (1964) and in Notice of Proposed Rule Making in Docket No. 16068 (June 21, 1965), no formal action has been taken with respect to the Seven Station Rule.

27. The FCC's issuance of its Sixth Report and Order in Docket No. 8736, 41 F.C.C. 148 (1952), ended the freeze on new TV station construction effective July 1, 1952. Howard, *supra* note 3, at 9, indicates that the Seven Station Rule was promulgated at a time of great activity in the expansion of broadcasting. According to Sterling, *Television and Radio Broadcasting*, WHO OWNS THE MEDIA? 80 (1979), 108 television stations were on the air when the freeze was lifted. By 1956 there were 441 television stations in operation.

28. *See* E. BARNOUW, THE GOLDEN WEB 288-90 (1968) for a discussion of television's impact on radio ratings. As of December 1953 there were 2,495 licensed AM stations on the air and 537 licensed FM stations. These totals represent growth rates of 35% and 171% respectively from 1948 when the FCC first proposed the Seven Station Rule.

29. *See supra* note 6.

30. The only evidence in Docket No. 8967 suggesting that small broadcasters might have favored the Rule was a letter from E. B. Craney of Pacific Northwest Broadcasters. Docket No. 8967, 5 (Aug. 31, 1948). In Craney's view two Class 1A's in the hands of one individual tends toward monopoly; one Class 1A in the hands of a national network tends toward monopoly; and that if the FCC planned a limitation with respect to the number of stations the best way is to license one station to each applicant.

31. *See Senator Johnson Blasts FCC Seven-TV-Limit Proposal*, BROADCASTING Jan. 18, 1954 at 31. *See also* 93 CONG. REC. 5586, in which Senator White suggests that concentration of control limitations should be decided by Congress rather than the FCC. Section 19 of S. 1333 (1948) provided that no persons under common control shall own or control stations in the same broadcast band which serves more than 25% of the population. This wording was dropped by the time the bill was reported out of committee on June 9, 1948.

32. This author's operational definition of a "reasonable" compromise is that all of the parties interested in the outcome get something, but none get everything they wanted. This approach normally results in a decision which will be upheld on appeal.

33. This objective is not explicitly stated in the Commission's decision in Report and Order in Docket No. 8967, 18 F.C.C. 288 (1953). The clearest support for this view is contained in Brief for Petitioners at 41-42, United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) [hereinafter cited as Brief for Petitioners]. The policy objective which the FCC followed in this

The FCC's reasons for promulgating arbitrary numeric limitations fall into two categories: 1) fulfillment of agency responsibilities as outlined by statute and interpreted by case law, and 2) specific reasons for choosing the numeric limitations contained in the Order.[34]

A. *Fulfillment of Agency Responsibilities*

The Seven Station Rule was "designed to implement the Congressional policy against monopoly."[35]

> One of the basic underlying considerations in the enactment of the Communications Act was the desire to effectuate the policy against the monopolization of broadcast facilities and the preservation of our broadcast system on a free competitive basis. *See Federal Communications Commission v. Sanders Brothers*, 309 U.S. 470 (1940). This Commission has consistently adhered to the principle of "diversification" in order to implement the Congressional policy against monopoly and in order to preserve competition. That principle requires a limitation on the number of broadcast stations which may be licensed to any one person or persons under common control. It is our view that the operation of broadcast stations by a large group of diversified licensees will better serve the public interest than the operation of broadcast stations by a small and limited group of licensees.[36]

The FCC was careful to explain that it was not attempting to enforce the antitrust laws through the Seven Station Rule.[37] Rather, it stressed that "the fundamental purpose [of the rules] is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest."[38]

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decision is consistent with the theory of FCC behavior forwarded by R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 120-21 (1973). They contend that "[g]iven the information available to them, the commissioners attempt through their decisions to maximize some objective function, including the welfare of the commissioners as individuals and of groups affected by their decisions, and the survival and growth of the regulatory agency." *Id.*

34. *See* Report and Order in Docket No. 8967, 18 F.C.C. 288 (1953).

35. *Id.* at 291. The Commission pointed to sections 311 and 313 of the Communications Act for specific authorization. *Id.* at 290.

36. *Id.* at 291. Further support for the FCC's position is provided in FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940). Congress was gravely concerned that, absent an assertion of governmental control, "the public interest might be subordinated to monopolistic domination in the broadcasting field." *See also* Associated Press v. United States, 326 U.S. 1, 20 (1945). Competition in the presentation of viewpoints, no less than competition in the economic sense, is vital, for "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ." *Id.*

37. *See* Report and Order in Docket No. 8967, 18 F.C.C. 288, 290 (1953). The Communications Act of 1934 does not empower the Commission to enforce the antitrust laws. Every time the Commission has dealt with communication ownership issues, the affected industry bases part of its case on this fact. However, from Mansfield Journal Co. v. FCC, 180 F.2d 28 (D.C. Cir. 1950) to the present (*see supra* cases cited in note 7), the courts have made it abundantly clear that the FCC's powers in this area go far beyond those contained in the antitrust laws.

38. *See* Report and Order in Docket No. 8967, 18 F.C.C. 288, 290, 291 (1953).

B. United States v. Storer Broadcasting Co.

The *Report and Order* in Docket 8967 provided the general philosophy underlying the FCC's Seven Station Rule. However, additional insight into the FCC's rationale for promulgating the Rule was provided when Storer Broadcasting challenged the Seven Station Rule in court.[39] The brief filed on behalf of the Commission in the United States Supreme Court[40] presented a number of additional arguments in support of the contention that the Seven Station Rule was "reasonable." The Commission advanced the traditional rationale for regulation of broadcasting—scarcity of available channels[41]—to support the need for an upper limit on the number of stations that any one entity could own.[42] Another familiar theme—the media power rationale for regulation—was also used to justify the rules.

> Moreover, since the formation of public opinion is important on the national, as well as on the local level, effective diversification cannot be achieved merely by assuring that there will be some competition in each region. To permit the growth of large chains, however, the component stations might happen to be distributed, would be to invite a creeping trend to uniformity.[43]

The Commission further argued that the Rule would protect small, independent broadcasters from the bargaining advantages possessed by chain broadcasters,[44] and that the Commission's primary statutory rationale for promulgating the Rule was to assure "the larger and more effective use of radio."[45] Additional reasons cited by the FCC for upholding the Seven Station Rule were that the rules rests on the informed judgment of years of agency experience[46] and is eminently reasonable,[47] that a trend toward heavy concentration is antithetical to the maximum utilization of radio facilities and contrary to the public interest,[48] and that promulgation of a multiple ownership rule is a fairer, more efficient procedure than an *ad hoc* approach to the issue.[49]

C. *Why the Commission Chose A Limit of Seven*

The vagueness of the record presenting the FCC's rationale for selecting specific numeric limitations on ownership is in sharp contrast to the specific-

39. *See* United States v. Storer Broadcasting Co., 220 F.2d 204 (D.C. Cir. 1955), *aff'd*, 351 U.S. 192 (1956).

40. Brief for Petitioners, *supra* note 33 at 12.

41. *See* B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION 103 (1975).

42. *See* Brief for Petitioners, *supra* note 33, at 12.

43. *Id.* at 13.

44. *Id.* This view provides a fuller understanding of what the FCC meant by preventing "any undue concentration of economic power contrary to the public interest." *See* Report and Order in Docket No. 8967, 18 F.C.C. 288 (1953).

45. 47 U.S.C. § 303(g). This section also was used to support the FCC's Chain Broadcasting Regulations in NBC v. United States, 319 U.S. 190, 216 (1943).

46. *See* Brief for Petitioners, *supra* note 33, at 14.

47. *Id.* The FCC made it clear in this portion of its brief that Storer had the burden of demonstrating that the Seven Station Rule was unreasonable, and that Storer had failed to do so.

48. *Id.* at 35.

49. *Id.* at 36-37.

ity of the regulatory philosophy portions just discussed. The FCC selected the number seven in the case of AM stations "in order that present holdings of such stations be not unduly disrupted."[50] In addition, the seven station limit "is consistent with the historical development of AM broadcasting and the tremendous expansion that has been achieved" within that framework.[51] In the case of FM stations, the number seven was selected because "[i]t is considered desirable to have the same limitation applicable to both aural services because of their inter-relationship and the present status of FM's growth."[52] Finally, the number five was continued in effect for television because the Commission indicated that "based on extensive experience with the problems of multiple ownership, [the limitations] have proven practicable and desirable."[53]

III. THE STATUS OF GROUP OWNERSHIP IN RADIO

Past studies of broadcast group ownership have primarily focused on television, with little research of radio. Because radio group ownership has received so little attention, this section will briefly review past empirical attempts to identify the impact that group ownership has had on various measures of television performance, and the economic reasons for being engaged in radio group ownership. Summary data regarding the extent of radio group ownership over time will be presented.

A. *Review of TV Studies*

A number of studies have been conducted that partially assess the impact of television group ownership on station performance. The results of the studies are not conclusive when applied to group ownership in radio. However, because they provide the only empirical evidence available with respect to group-owned broadcast station behavior, a review is in order.

The evidence regarding group ownership in television suggests that it has had minimal impact on station profitability[54] or station rates.[55] Such

50. *See* Report and Order in Docket No. 8967, 18 F.C.C. 288, 295 (1953).

51. *Id.* at 295. Cohn, *Proceedings of the Symposium on Media Concentration*, 1 FTC 203 (1978), indicates that the number seven was selected while he was at the Commission in the early 1940's on the theory that anyone who controlled more than one percent of the AM stations on the air would be a monopolist. *See also Magic Number*, BROADCASTING Aug. 31, 1981 at 16. The FCC's chief staff architect of the Seven Station Rule, Arthur Scheiner, disagrees with Cohn. He states that the Seven Station Rule limits "were not intended to represent any given percentage of existing stations." *See Ownership Background*, BROADCASTING Sept. 14, 1981 at 23.

52. Report and Order in Docket No. 8967, 18 F.C.C. 288, 295 (1953).

53. *Id.* at 294.

54. P. CHERINGTON, L. HIRSCH, & R. BRANDWEIN, TELEVISION STATION OWNERSHIP: A CASE STUDY OF FEDERAL AGENCY REGULATION (1970); Boyer & Wirth, *The Economics of Regulation by Policy Directive: FCC Public Interest Requirements*, 21 Q. REV. OF ECON. AND BUS. 77, 90 (1981); Levin, *Competition, Diversity, and the Television Group Ownership Rule*, 70 COLUM. L. REV. 791, 799, 810 (1970). The Boyer and Wirth study suggests that group owners, as compared with nongroup owners, behave in a way which indicates they believe FCC license renewal criteria are relatively insensitive to the quantities of public interest programming. Since this should lead group-owned stations to offer slightly less public interest programming than stations without such ownership ties, it should also lead to somewhat larger profits for group-owned TV stations, other things being equal. *See also* Bortz, Wirth, & Pottle, *The Economics of Television Station Operation in 100-Plus Markets* 94 (Feb. 1981) (for National Association of Broadcasters).

ownership had a mixed impact on the quantity of public interest programming that was broadcast,[56] and a positive impact on market level income and revenue.[57] The empirical case against group ownership in the more highly concentrated television industry is not a persuasive one.[58] In radio, anticompetitive behavior resulting from group ownership is even less likely to occur due to the much larger number of operating stations.[59] In conclusion, the empirical evidence suggests that at current levels group ownership in television (and by analogy, radio) has not resulted in anticompetitive station behavior.[60]

B. *The Economics of Radio Group Ownership*

Entrepreneurs who purchase and operate multiple radio stations would have an economic incentive to do so if group ownership resulted in economies of scale from reduced costs of purchasing, selling, investing, production, and/or management;[61] if radio station ownership were highly profitable;[62] or if group ownership in radio provided significantly greater market power relative to nongroup-owned stations.[63]

Based on the present levels of radio group ownership, an entrepreneur could expect the economies of scale to be quite small.[64] This is partially due to the fact that radio program costs are considerably lower than are televi-

55. Both P. CHERINGTON, L. HIRSCH, & R. BRANDWEIN, *supra* note 54, and Wirth & Wollert, The Effects of Market Structure on Television News Pricing (Aug. 1981) (paper presented at Annual Convention of Association for Educators in Journalism) support this notion.

56. *See* Boyer & Wirth, *supra* note 54, at 90; Litman, *Public Interest Programming and the Carroll Doctrine: A Re-Examination*, 23 J. OF BROADCASTING 51, 58 (1979), for evidence suggesting that group-owned TV stations offer somewhat less public interest programming than do non-group owned TV stations. Evidence supporting the opposite view can be found in Wirth & Wollert, *Public Interest Programming: Taxation by Regulation*, 23 J. OF BROADCASTING 319, 324 (1979); Wirth & Wollert, *Public Interest Programming: FCC Standards and Station Performance*, 55 JOURNALISM Q. 554, 560 (1978).

57. Levin, *Research Memorandum on the Economic and Programming Effects of Newspaper Ownership of Television Stations*, Supplementary Comments in Docket No. 18110 (May 1974).

58. *See Media Concentration: Hearing before the Subcomm. on General Oversight and Minority Enterprise of the House Comm. on Small Business*, 96th Cong., 2d Sess., 426 (1980) (Part 1) (statement of John F. Lyons) [hereinafter cited as *Media Concentration*].

59. *Id.* at 417.

60. *Id.* On the other hand, depending on one's political perspective, the evidence that group ownership has very little effect on station performance could be used to demonstrate that allowing group ownership does not result in positive social benefits. This could then be used to argue that because there are no public interest advantages to be derived from group ownership, there is no reason to allow it. Clearly, the party who has the burden of proof in the above situation will lose.

61. *Id.* at 425-26. *See also* C. FERGUSON & J. GOULD, MICROECONOMIC THEORY 208-09 (1975).

62. *See Media Concentration*, *supra* note 58, at 425.

63. *Id.* at 424. Possession of such market power would allow a group owner to behave anticompetitively by engaging in a scheme of predatory pricing to drive competitors out of individual markets. Group ownership would have to result in excess profits, for the group as a whole, for this to occur. This would allow a group owner to subsidize predatory (intentionally lower) prices in one market with excess profits from another. *Id.*

64. It is possible that significant economies could be achieved by owning a larger number of stations than is presently allowed. With all of the recent movement to expand the number of national radio networks particularly via satellite distribution, there might be a cost-based incentive for radio networks to expand their ownership of stations if the seven station limit is lifted.

sion program costs.[65] Although no evidence exists in this area, it is arguable that some economies should occur with respect to sales and investment for group-owned stations. However, these economies could not be expected to result in much higher returns on investment.[66]

In addition, profitability will not provide much incentive to operate multiple radio stations since the evidence suggests that radio stations in general are only earning normal economic profits.[67] In 1979 the average radio station which reported to the FCC earned gross revenues of $424,421, which resulted in earnings before taxes of only $30,160.[68] Consequently, the average radio station had a 1979 pretax profit margin of only 7.1%.[69] The FCC's figures also indicated that approximately forty percent of the radio stations from which the Commission received financial data were losing money in 1979.

Finally, it does not appear likely that group-owned radio stations in general possess much market power.[70] No evidence exists which would indicate that radio station groups have ever used market power to engage in predatory pricing.[71] Inasmuch as the average radio station in this country faces tremendous competition, not only from other radio stations, but also from television stations and daily newspapers, a market power incentive to form radio groups does not appear to exist.[72]

C. *The Extent of Radio Group Ownership*

Group ownership in radio can be analyzed as an increasing trend, or conversely, as limited and level growth. Table 1 indicates that both the number of group-owned radio stations and the percentage of all stations which are group-owned have increased over time. For example, in 1953 when the Seven Station Rule was promulgated, 423 of the 3,032 licensed commercial radio stations on the air were group-owned. In 1980, 2,124 of the 7,839 commercial stations on the air were group-owned. During this twenty-seven-year period, the percentage of stations that are owned in groups of three or more rose from 14% to 27.1%, which is an average annual

65. *See Media Concentration*, *supra* note 58, at 438.

66. *Id.* at 427.

67. B. OWEN, *supra* note 41, at 122, suggests that radio is the most competitive form of mass media other than magazines. Radio is considered to be monopolistically competitive. Monopolistically competitive firms do not earn long run economic (excess) profits. *See also* Martin, *Competition in the Broadcasting Industry: A Status Report* 38-44 (June 1981) (report prepared for National Association of Broadcasters).

68. FEDERAL COMMUNICATIONS COMMISSION, *1979 Radio Revenue Data*.

69. Radio stations had a much better year in 1978 when the average station earned a pretax profit margin of 11.6%. However, investors looking for high-yield investment opportunities would not be likely to invest in the average commercial radio station. This is not to say that there are not stations which earn much higher returns than average. It appears, however, that a profit-based rationale for the formation of radio groups is not very strong.

70. *See supra* note 67.

71. *See Media Concentration*, *supra* note 58, at 424-25.

72. The economics of the radio industry are considerably different from those of the television industry. The costs of owning and operating a radio station are much lower than those of a television station. This fact coupled with the much larger number of frequencies available in radio has resulted in extensive competition for radio broadcasters in all but the smallest markets. *Id.* at 417.

increase in group-owned radio stations of .49%.[73]

TABLE 1[74]

RADIO GROUP OWNERSHIP: 1929-1980

Year	Total No. of AMs	Total No. of FMs	No. of Group Owners	No. of Group-Owned Stations	Avg. No. of Stations Owned/Group	Percent of Stations Under Group Ownership
1929	600	—	12	20	1.7	3.3%
1939	764	—	39	109	2.8	14.3%
1951	2,295	558	63	253	4.0	8.9%
1953*	2,495	537	88	423	4.8	14.0%
1960*	3,483	732	185	765	4.1	18.1%
1970*	4,304	2,145	250	1,432	5.7	22.2%
1978*	4,498	3,010	324	1,906	5.9	25.4%
1980*	4,572	3,267	360	2,124	5.9	27.1%

*Only groups which owned three or more radio stations are included for these years because this is the *BROADCASTING YEARBOOK* definition of radio group ownership.

Another way to assess the extent of radio group ownership is to identify the average number of stations controlled per group entity over time. The data provided in Table 1 reveals a positive trend which has been level since 1970. Specifically, the number of radio stations controlled by the average group owner in 1953 was 4.8. By 1980 this figure had risen to 5.9 stations.[75] Because the FCC's Seven Station Rule allows for ownership of up to fourteen radio stations, the 1980 figure indicates that the average group owner controls only 42.1% of the legally permissible number of radio stations.

A final method by which to examine radio group ownership trends is to identify how many entities control various combinations of AM and FM stations. Tables 2 through 5 provide insight into the mix of AM-FM group ownership combinations over time. Only three entities control the maximum number of radio stations allowed under the Seven Station Rule. This has been true since at least 1970 (Table 3). Forty-six of the 360 group entities in 1980 controlled ten or more stations (Table 5). The larger groups controlled a total of 531 radio stations or 6.8% of all the commercial radio stations on the air.[76]

73. If the number of radio stations on the air remained fixed at the 1980 level, and group ownership continued to increase at this pace, it would take 149 years for all of the commercial radio stations in the United States to come under some form of group control.

74. The sources for Table 1 are: C. STERLING & T. HAIGHT, THE MASS MEDIA Table 260c (1978); BROADCASTING (various dates); BROADCASTING YEARBOOK (various dates); *Media Concentration: Hearing before the Subcomm. on General Oversight and Minority Enterprise of the House Comm. on Small Business*, 96th Cong., 2d Sess. 418 (1980) (Part 1) (statement of John F. Lyons) [hereinafter cited as *Media Concentration Hearing*].

75. An increase in the average number of stations controlled by each group is understandable. In 1953 there was not much interest in owning FM stations due to low profitability. Consequently, radio broadcasters interested in making a profit were able to own only seven potentially profitable AM stations. As more people started listening to FM stations, owners became more interested in owning FMs. A group owner could then own 14 stations potentially capable of earning a profit. This fact alone could cause the increase evidenced in Table 1.

76. In 1978, 36 entities owned 10 or more stations. This represented 409 stations or 5.4% of all the stations in operation. *See Media Concentration supra* note 58, at 419.

The data provided relative to radio group ownership suggest that the radio industry is essentially unconcentrated at the national level. Nearly seventy-three percent of this country's radio stations are individually owned, thus competition at the national level would appear to be more than adequate.[77]

TABLE 2[78]

ENTITIES WITH CONTROL OF THREE OR MORE COMMERCIAL RADIO STATIONS IN 1953

		Number of AM Stations									
		0	1	2	3	4	5	6	7	Total	# FM
Number	0				29	15	10	3	2	59	0
	1			0	5	5	1	1	0	12	12
of	2		0	0	4	2	0	0	0	6	12
	3	0	0	0	2	0	0	1	1	4	12
FM	4	0	0	0	0	0	1	1	0	2	8
	5	0	0	0	0	0	2	0	1	3	15
Stations	6	1	0	0	0	0	0	0	1	2	12
	7	0	0	0	0	0	0	0	0	0	0
	Total	1	0	0	40	22	14	6	5	88	71
	# AM	0	0	0	120	88	70	36	38*	352	

*CBS owned nine AMs and J. Elroy McCaw controlled eight prior to the FCC's adoption of the Seven Station Rule.

77. The extent of national radio concentration that exists has undoubtedly been influenced by the FCC's Seven Station Rule. At present, no one entity can own more than .18% of the operational commercial radio stations. Some upward movement in radio's concentration picture would probably take place if the Commission increased the number of stations that could be owned by any one entity. Whether such increases in group ownership would result in anticompetitive behavior or the potential for such activity on either the information or the advertising side of the national media market is of course germane to the policy question being explored in this article.

78. Table 2 was derived from BROADCASTING YEARBOOK (1954). Figures in the main body of the table represent the number of entities owning that combination of AM and FM radio stations. For instance, in 1953 there were 29 entities which owned three AMs and zero FMs. Total rows and columns give the number of entities owning a certain number of AM or FM stations. In 1953, there were 40 entities which owned three AMs and between zero and seven FMs. Adding these columns or rows gives the total number of entities owning three or more radio stations in that year. In 1953 there were 88 such entities. Rows marked AM and columns marked FM give the number of AM or FM stations owned by those entities. The total represents the number of multiply-owned stations.

TABLE 3[79]

ENTITIES WITH CONTROL OF THREE OR MORE COMMERCIAL RADIO STATIONS IN 1970

		Number of AM Stations									
		0	1	2	3	4	5	6	7	Total	# FM
Number	0				29	14	2	6	7	51	0
	1			15	23	14	4	5	1	62	62
of	2		5	19	18	10	4	2	2	60	120
	3	1	0	0	15	9	5	6	4	40	120
FM	4	0	0	0	1	4	4	4	1	14	56
	5	1	0	0	0	1	6	2	2	12	60
Stations	6	1	0	0	0	2	0	3	2	8	60
	7	0	0	0	0	0	0	0	3	3	21
	Total	3	5	34	86	54	25	28	15	250	487
	# AM	0	5	68	258	216	125	168	105	945	

TABLE 4[80]

ENTITIES WITH CONTROL OF THREE OR MORE COMMERCIAL RADIO STATIONS IN 1978

		Number of AM Stations									
		0	1	2	3	4	5	6	7	Total	# FM
Number	0				10	4	2	1	0	17	0
	1			50	17	7	2	0	0	76	76
of	2		16	28	25	13	3	2	2	89	178
	3	1	4	7	30	19	3	2	1	67	201
FM	4	0	1	0	3	15	10	4	0	33	132
	5	2	0	0	4	1	6	4	0	17	85
Stations	6	3	0	1	0	0	4	6	2	16	96
	7	0	0	0	1	1	2	2	3	9	63
	Total	6	21	86	90	60	32	21	8	324	831
	# AM	0	21	172	270	240	160	156	56	1075	

79. The source of Table 3 was *Media Concentration Hearings, supra* note 74, at 418.
80. Table 4 was derived from *Media Concentration Hearings, supra* note 74, at 418.

TABLE 5[81]

ENTITIES WITH CONTROL OF THREE OR MORE COMMERCIAL RADIO STATIONS IN 1980

		Number of AM Stations									
		0	1	2	3	4	5	6	7	Total	# FM
Number	0				12	4	1	1	0	18	0
	1			47	18	5	2	1	0	73	73
of	2		18	42	23	12	3	2	0	100	200
	3	3	4	14	25	18	2	2	0	68	204
FM	4	0	0	7	6	22	8	5	1	49	196
	5	2	1	1	5	2	7	6	2	26	130
Stations	6	0	1	0	0	0	0	9	3	13	78
	7	0	0	0	1	2	2	5	3	13	91
	Total	5	24	111	90	65	25	31	9	360	972
	# AM	0	26	222	270	260	125	186	63	1152	

IV. ARGUMENTS FOR RETENTION OF THE SEVEN STATION RULE

The past position of the FCC regarding the promulgation and retention of the Seven Station Rule has already been discussed in detail. The arguments posed by other proponents of retention or expansion of the present rule will be summarized in the remainder of this section.

A. *Position of the United States Supreme Court*

The Supreme Court's decision in *United States v. Storer Broadcasting Co.*[82] upheld the Commission's statutory authority to establish the Seven Station Rule.

> Congress sought to create regulation for public protection with careful provision to assure fair opportunity for open competition in the use of broadcasting facilities. . . . It is but a rule that announces the Commission's attitude on public protection against such concentration. . . . The growing complexity of our economy induced the Congress to place regulation of businesses-like communication in specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions. We think the Multiple Ownership Rules, as adopted, are reconcilable with the Communications Act as a whole.[83]

However, the Court did not attempt to evaluate the merits of the specific station limitations selected by the Commission.[84]

81. The source for Table 5 was BROADCASTING/CABLE YEARBOOK (1981).

82. 351 U.S. 192 (1956).

83. *Id.* at 203.

84. Typically, the courts do not engage in such evaluation. Instead, the courts review Commission decisions to determine if they are "reasonable." If such decisions are deemed to be reasonable, they will be upheld. The party appealing a Commission decision has the burden of demonstrating the unreasonableness of the decision. In this situation, the courts (particularly the Supreme Court) normally defer to the expertise of the Commission in deciding what is reasonable. *See generally*, Gray v. Powell, 314 U.S. 402 (1941).

B. *Position of Congress*

Congress has been fearful of "monopoly" in the communications industry from the industry's inception.[85] Past sentiment appears to have fallen on the side of tightening the multiple ownership rules rather than liberalizing them.[86]

Senator Magnuson, for example, stated he was afraid that if Congress failed to act or if the FCC did not institute anti-monopoly ownership rules, the radio industry would become concentrated in a manner similar to the newspaper industry.

> I think it is wise that this Congress do what it can to prevent in the future any such thing . . . [a]lthough now in most communities where there are six stations there are probably six owners, as competition continues and some stations get bad, one man will start to buy them up. There are two or three people in the country starting to buy up radio stations, and then pretty soon we will get into the same monopolistic situation in a geographical area that now exists in the newspaper field.[87]

Nine years later Senator Bricker proposed to abolish the FCC's Seven Station Rule, not because he was opposed to the principles underlying the FCC's regulation but because he argued it was desirable to substitute "for such sterile abstraction, a realistic and workable public interest criterion of maximum coverage or service to 25% of the country's population."[88]

The argument that the rule should be made more stringent was expressed by Emanuel Celler, Chairman of the Antitrust Subcommittee of the House Judiciary Committee, who said that the FCC may have sanctioned excessive concentration in the broadcasting industry.[89]

> Multiple ownership of broadcasting stations by a single interest . . . leads to concentration, militates against the national objective of diversity of program sources, and lends itself to anticompetitive abuses. Network affiliation agreements examined by the Antitrust Subcommittee reveal that multiple-station owners often derive substantial advantages over sole-station owners in compensation and other terms, making it difficult for sole-station owners to compete effectively with owners of several stations.[90]

Ultimately, Congressman Celler's Committee failed to recommend any

85. *See supra* note 36. *See also* Warner, *Monopoly and Monopolistic Practices and the Communications Act of 1934*, 6 FED. COMM. B.J. 26, 26-35, 55-60 (1941).

86. The majority of Congressional sentiment that was expressed in hearings during the 1940's and 1950's suggests too much concentration existed in the communications industry under the Seven Station Rule. The primary Congressional proposal to "make a better mousetrap" was to restrict ownership to coverage of 25% of the U.S. population. *See* Sen. Bricker's proposal in S. 3859, 84th Cong., 2d Sess., 102 CONG. REC. 8210 (1956); Sen. White's proposal in S. 1333, 80th Cong., 1st Sess., 93 CONG. REC. 5586 (1947).

87. *Hearings on S. 1333 Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 80th Cong., 1st Sess., 327 (1947) [hereinafter cited as *Hearings on S. 1333*].

88. *Bricker Lowers the Boom on CBS, NBC "Domination"*, BROADCASTING Apr. 30, 1956 at 29. Sen. Bricker's bill, S. 3859, *supra* note 86, never became law.

89. *See* Celler, *Antitrust Problems in the Television Broadcasting Industry*, 22 L. & CONTEMP. PROB. 539, 549 (1957). Celler stated that the Seven Station Rule was contrary to antitrust principles because it sanctioned excessive concentration in the broadcast industry.

90. *Id.* at 561.

changes in the FCC's Multiple Ownership Rules, but the Committee indicated that the Commission should give "antitrust and other factors emphatic consideration" in any multiple ownership rule changes.[91] Chairman Celler concluded that "if anything, [the Seven Station Rule should] be rendered more stringent; it should not be relaxed."[92]

C. *Position of the Justice Department*

The United States Department of Justice has generally supported retention of the Seven Station Rule. One of its earliest pronouncements concerning the rule was made by Victor Hansen, Chief of the Antitrust Division in 1956. Hansen stated that an eradication of the numerical limitation may increase the trend toward concentration, which he considered undesirable in either networks or single individuals.

> The Commission deplored the trend toward concentration of ownership and control of radio stations. The same trend has been observed with respect to television. Ownership of a large number of [television] stations by a single interest raises real antitrust problems. Such owners would be in a position to [capitalize] on mass purchasing power and by combining their outlets in single-station markets with their outlets in multiple-station markets. We have received complaints that these tactics have already been employed by multistation owners who obtain preferences in network affiliations over single-station owners. . . . [T]he multiple-ownership rule should be, if anything, tightened, not relaxed.[93]

The Antitrust Division's support for the Seven Station Rule is understandable because the rule establishes limits on ownership, thus alleviating nationwide concerns about "bigness." Donald Baker, formerly with the Antitrust Division of the United States Department of Justice, has indicated that the antitrust laws "have to be brought to bear on actual market situations" to be effective.[94] Even though the Seven Station Rule could not be enforced under the antitrust laws, Baker suggests that it is an appropriate rule because "in special circumstances [it is desirable] to have some *other* public policies that are concerned with bigness without regard to proof of economic effect."[95]

D. *FCC's Network Broadcasting Study*

One of the most controversial reports to come out in the 1950's was the FCC's study of network broadcasting,[96] which was supervised by Dean Ros-

91. *See* REPORT ON THE TELEVISION BROADCASTING INDUSTRY, ANTITRUST SUBCOMM. OF THE HOUSE COMM. ON THE JUDICIARY, 85th Cong., 1st Sess. 141 (1957).

92. *See* Celler, *supra* note 89, at 561.

93. *Hearings on Television Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 84th Cong., 2d Sess. 4122-23 (1956).

94. Baker, *Uses and Abuses of Antitrust Principles in Dealing with Media Concentration Questions*, PROCEEDINGS OF THE SYMPOSIUM ON MEDIA CONCENTRATION, 2 FEDERAL TRADE COMMISSION 649, 651 (1978).

95. *Id.* (emphasis in original).

96. *Network Broadcasting*, REPORT OF THE NETWORK STUDY STAFF OF THE NETWORK STUDY COMMITTEE, FEDERAL COMMUNICATIONS COMMISSION (1957).

coe Barrow, director of the FCC Study Staff. The study's conclusions were not favorable to multiple ownership in television.[97]

> The trend in multiple ownership indicates that in the future there will be substantial problems of undue concentration of control, in the absence of limitations imposed by the Commission . . . as multiple ownership increases, single-station ownership decreases. The single-station owner is at a bargaining disadvantage and may not be able to compete effectively with multiple owners. . . . It is possible that the broadcasting industry will become a multiple-unit industry and the character of a television station as a community institution will be lost. . . .[98]

The network study staff argued that strict limits on multiple ownership substantially lessened the opportunity for a multiple-station TV licensee to impose potentially illegal tie-in arrangements. Examples of such arrangements include a multiple-station licensee who 1) refuses to sell time on one of his stations to a national spot advertiser unless time is sold for all of his stations; 2) refuses to clear some of his stations for a network program unless the national advertiser purchases times on all of his stations; or 3) refuses to purchase film from a syndicator for all or several of his stations unless given a highly favorable pricing arrangement.[99] Obviously, Dean Barrow's position is that multiple ownership leads to anticompetitive behavior in the television industry and that it runs counter to the FCC's notions of local station ownership and operation.[100] In 1957, when the Report was released, Dean Barrow argued that the best course for the Commission to take was further limitation, rather than relaxation, of the existing rules.[101]

The report did not deal specifically with radio group ownership, since the network study was directed toward television. Dean Barrow's study did indicate, however, that "[t]he Congress and the Commission have historically placed major dependence upon competition as a regulator of radio broadcasting, [and] the kind of competition that has developed appears to be healthy."[102]

E. *Position of Small Broadcasters*

The position of small radio broadcasters regarding the FCC's Seven Station Rule is unclear due to lack of available information. The best evidence suggesting that small, independent broadcast licensees favor the Rule is derived from a National Association of Broadcasters (NAB) inter-office memo.[103] The memo indicated that NAB had not become involved in the FCC's multiple ownership hearings in Docket 8967 "because of the obvious conflict in interest between those who are in a position to own a number of stations and those who are not—in other words, large interests vs. small

97. *Id.* at 553-99.
98. *Id.* at 554.
99. *Id.* at 565-68.
100. *Id.* at 592.
101. *Id.* at 584-85.
102. *Id.* at 606.
103. National Association of Broadcasters Inter-Office Memo from Don Petty to Judge Miller and A. D. Willard (Jan. 19, 1949).

interests."[104]

Other evidence suggesting that smaller broadcasters favor some type of ownership limitation is shown by testimony of Edmund Craney, a small market broadcaster with stations in Spokane, Washington, Portland, Oregon, and in Butte, Helena, and Bozeman, Montana.[105] Craney stated that although he was against a simplistic numeric limitation on station ownership,[106] he was in favor of the congressionally suggested twenty-five percent of population limitation of ownership solution to the concentration problem.[107] He testified that his biggest fear was that in the absence of an upper limit on ownership, all of the broadcasting stations in the country would eventually come under government control.[108] "It is better to try something than to sit still and do nothing. I do not have to tell you gentlemen that if we in the industry remain blind, we will wake up one day facing an irresistible clamor for Government ownership or operation."[109]

V. ARGUMENTS AGAINST RETENTION OF THE SEVEN STATION RULE

The most extensive arguments against retention of the Seven Station Rule were presented by Storer Broadcasting Company in its court challenge of the Rule.[110] Other parties opposed to the FCC Rule include the national commercial broadcasting networks, group broadcasters, and minority opinion at the FCC.

A. *Position of Storer Broadcasting*

Storer's general rationale for opposing the Seven Station Rule was based on three grounds: "[T]he Commission failed completely 1) to make any basic or ultimate factual findings or determinations, 2) to make any attempt at rational conclusions based upon any factual considerations or 3) to state clearly the basis or reasons for establishment of the numerical limits."[111]

Storer contended that because Congress has never enacted any special antimonopoly legislation applicable to broadcasting, the Seven Station Rule was invalid.[112] Storer also suggested that the Rule violated the antitrust laws because it "prevents a merger between two entities without regard to the facts concerning the actual or potential effect of such acquisition on competition."[113] Storer argued that the Rule could not be sustained because it ignored the substantial differences between various broadcasting stations

104. *Id.*
105. *See Hearings on S. 1333, supra* note 87, at 542.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).
111. *See* Brief for Respondent, *supra* note 6, at 36.
112. *Id.* at 22-25.
113. *Id.* at 23-24. Storer contended that the FCC had to evaluate: 1) the purpose of an acquisition, 2) the existence, number, activity, and strength of competitors in the market effected by the acquisition, and 3) the size and location of the interest proposed to be acquired. *See* United States v. Columbia Steel Co. 334 U.S. 495, 527-28 (1948).

with respect to geographical location, power, frequency, population served, hours of operation, pattern of coverage, and protection from interference by other stations.[114] Storer also attacked the Seven Station Rule as being arbitrary and capricious because it precludes consideration of whether a small increase in nationwide station ownership by a single entity could be in the public interest.[115]

The Rule was challenged as bearing no relation to the Commission's goal of diversification of program and service viewpoints because the rule applies to stations serving wholly different areas.[116] Storer supported its position by pointing out that the Rule can exclude a multiple owner from operating a station in areas where there are more facilities than qualified applicants, and where a multiple owner could bring an additional viewpoint.[117]

In summary, Storer argued that the Seven Station Rule was promulgated for administrative convenience and expedience,[118] rather than to further the Congressional policy against monopoly or to advance the Commission's principles of diversification.[119] The broadcast group indicated that the FCC failed to demonstrate that the numbers chosen bore "any rational relationship to 'concentration of control' of broadcasting 'contrary to the public interest, convenience or necessity.' "[120] Storer also contended that the Commission had conducted no studies and had no experience to support its inflexible numeric standard.[121] Finally, Storer argued that the right to obtain a hearing to waive the Seven Station Rule is "essentially nugatory" because the applicant is faced with the nearly impossible task of stating reasons why the arguably illogical rule does not apply to that multiple owner.[122]

B. *Position of the Networks*

Only two national networks filed comments in the FCC proceedings to establish the Rule—Columbia Broadcasting System (CBS) and National Broadcasting System (NBC). However, some insight into the position of other national networks is available from the 1947 Hearings on S. 1333.[123]

It appears that the position taken by CBS during the Commission's pro-

114. *See* Brief for Respondent, *supra* note 6, at 24-25.
115. *Id.* at 25.
116. *Id.* at 27.
117. *Id.* at 28.
118. *Id.*
119. *Id.* at 33.
120. *Id.* Storer also contended that it is highly doubtful that the FCC could establish rational arbitrary numeric limits on ownership since the Congress, the courts, and those agencies charged with enforcing the antitrust laws have not found any generally applicable test of what constitutes undue concentration in any situation. *See* Supplemental Brief for Respondent at 11, United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) [hereinafter cited as Supplemental Brief].
121. *See* Brief for Respondent, *supra* note 6, at 33-34.
122. *See* Supplemental Brief, *supra* note 120, at 19. Storer added that to obtain a waiver of the Seven Station Rule, an applicant would have to assert negative reasons. This would be difficult, however, because the Commission refused to air its affirmative reasons for promulgating the Rule.
123. *See Hearings on S. 1333, supra* note 87.

mulgation of the Rule was one of resignation. Such resignation is apparent in a letter from CBS President Frank Stanton, in which he requested the national ownership limit be set at eight AM stations, eight FM stations, and eight TV stations.[124] Although Stanton also forwarded CBS's opposition to the proposed rules,[125] CBS must have decided that the FCC was committed to promulgating an arbitrary numeric limit on station ownership, regardless of the industry's opposition. Consequently, the letter was a pragmatic, conciliatory approach to attempt to obtain a higher arbitrary standard than the one proposed by the Commission.[126]

NBC on the other hand, argued that no rules were needed.[127] NBC stated that concentration of control questions should be decided on the facts of each case, and that fixing a limit on ownership without regard to such facts would be arbitrary.[128] NBC contended the FCC had no evidence that mere accumulation of station licenses beyond a set figure resulted in a stifling of competition or even a tendency in that direction.[129] In 1947, NBC's position was stated succinctly by its President Niles Trammel:

> I cannot see any need or justification for a limit on the ownership of broadcast stations, either by Commission action or by statute. The opportunity to serve the public should not be limited by arbitrary restriction. The present radio law does not establish any limitation on the ownership of stations beyond the requirements of the antitrust laws. During all the years since the establishment of broadcasting there has been no undue concentration of ownership.[130]

Two additional networks apparently opposed the Seven Station Rule even though they failed to file comments during the Commission proceedings. Mark Woods, President of the American Broadcasting Company (ABC), indicated his company preferred an *ad hoc* approach to ownership limits.

> Therefore, if it is control of thought that is feared, or control of political opinion, it cannot be eliminated in my opinion on any arithmetical basis. My recommendation is that no limit as to the number of stations be specified in the act and that the Commission

124. Letter of Frank Stanton, President of CBS, in Docket No. 8967 at 6-8 (Sept. 24, 1948).

125. *Id.*

126. CBS's real position regarding the Seven Station Rule would appear to be very close to the position it took with respect to S. 1333. Dr. Stanton testified that:

> There is no other field . . . that I know of in which the Government has set a fixed ceiling on the size of an enterprise. Even the Public Utility Holding Company Act, providing specific antitrust legislation in the utility field, does not set arbitrary limits in terms of units, size or population. In the newspaper and magazine field there has been no attempt by Congress or any Government agency to restrict growth by an arbitrary standard. It is difficult to understand why broadcasting should be singled out for special legislation of this unique type . . . I think that the normal antitrust provisions should prevail if there is monopoly.

Hearings on S. 1333, supra note 87, at 327.

127. *See* Comments of National Broadcasting Company in Docket No. 8967 at 18-25 (Sept. 27, 1948).

128. *Id.* at 20. NBC suggested there was no reasonable basis for the assertion that the control of 5, 10, or 20 stations would automatically create an undue concentration of control.

129. *Id.*

130. *See Hearings on S. 1333, supra* note 87, at 426.

> fix no limit which would prevent it from deciding each application on its own merits in the public interest.[131]

A different approach was advanced by the Mutual Broadcasting System to legislatively limit the Commission's power to deal with concentration of control issues in broadcasting.

> Instead of the indefinite provision on multiple-ownership in the White Bill or the arbitrary standard presently enforced by the Commission, I should prefer to have Congress confer, in some appropriately limited fashion, the power upon the Commission to consider the question of the tendency toward monopolization in connection with applications by multiple-station owners for authorization to erect additional stations or to acquire existing stations.[132]

The national networks appear to have been unanimously opposed to the promulgation of the Seven Station Rule.[133] In addition, the networks supported an *ad hoc* approach for dealing with concentration of ownership issues in broadcasting, in contrast to the arbitrary Rule approach.

C. *Position of Group Broadcasters*

The most extensive comments available in the FCC Rule proceedings were filed by Trans-American Television Corporation, Salt Lake City Broadcasting Co., Universal Broadcasting Co., and KMMJ, Inc.[134] These broadcasters were opposed to the Seven Station Rule because they argued that it would cause denial of applications in situations where the evil with which the Commission was concerned, concentration of control, did not in fact exist.[135] Consequently, they also favored a case-by-case approach in dealing with concentration of control issues.[136] The Rule was challenged as unnecessary because "the day may not be far removed when there is no longer a real scarcity of broadcasting facilities."[137] Finally, the four broadcast groups argued that the proposed Rule was arbitrary and capricious because it failed to consider many relevant concentration of control factors, such as geographical location and population served.[138]

Another broadcaster position was expressed by J.N. Bailey, Executive Director of FM Association:[139]

> [W]e feel that the Commission should promulgate no ironclad rule, but rather should handle FM station distribution in the manner in which AM stations are licensed. An occasion might arise whereby one large corporation operating stations profitably in six metropoli-

131. *Id.* at 281.
132. *Id.* at 358.
133. This position is based on the contention that CBS's true position was revealed in its testimony regarding S. 1333 in 1947.
134. *See* Statement on Proposal to Amend the Multiple Ownership Rules in Docket No. 8967 at 27-45 (Sept. 27, 1948).
135. *Id.* at 31. It was suggested that such uncalled for denials rendered the Rule unreasonable and an improper exercise of Commission discretion and power.
136. *Id.* at 34.
137. *Id.* at 29.
138. *Id.* at 44.
139. *See Hearings on S. 1333, supra* note 87, at 202-10.

> tan markets, could give service to some smaller unprofitable market or two, whereas such small markets could not support an independent station.[140]

Mr. Bailey's association obviously favored utilization of a case-by-case approach in dealing with multiple ownership in specific market areas.

Finally, growth-oriented group broadcasters opposed the Seven Station Rule as a limitation of their long-term investment opportunities in the broadcasting industry.

D. *Minority FCC Positions*

Although the majority FCC sentiment at the time the Seven Station Rule was established favored the Rule, various Commissioners expressed reservations concerning the adoption of arbitrary numeric limits. Commissioner Doerfer indicated that:

> I am constrained to record my misgivings about linking a numerical evaluation of stations with "undue concentration of ownership" as an unfailing guide as to what is in the public interest. . . .
>
> I have grave doubts as to the wisdom of picking a "number" without more reliable and persuasive evidence that the number chosen will in all cases mark the upper limits of what will safeguard the public interest. . . .[141]

Doerfer concluded that there was not much more than "intuition" as the Commission's basis for the present rule.[142]

Commissioner Jett explained he was philosophically opposed to imposition of arbitrary national ownership limits because no concentration existed, and regional concentration potentially presented a much worse problem than did national concentration. In addition, he argued that station power, dial position, and geography created large audience coverage discrepancies among radio stations.[143]

> I am opposed to any restriction which specifies a particular ceiling for the reasons given above, and in particular, the fact that engineering considerations may make it desirable to permit more stations to be owned in certain power and frequency categories than in the lower portion of the band.[144]

Another Commissioner who expressed doubts regarding the Commission's ability to establish a workable "rule of thumb" was Chairman Charles Denny. He indicated he did not have any formula, but did not agree that the present draft of S. 1333 contained the correct formula. Denny concluded he did not know whether such a formula could be devised.[145] As early as

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140. *Id.* at 208.

141. *See* Report and Order in Docket No. 10822, 43 F.C.C. 2797, 2804 (1954). Commissioner Doerfer actually concurred with the FCC's decision to allow entrepreneurs to own two additional TV stations (more than the five station limit) as long as both were UHFs. However, he obviously was less than enthusiastic in that support.

142. *Id.*

143. *See Hearings on S.1333*, *supra* note 87, at 65.

144. *Id.* at 66.

145. *Id.* at 45.

June 1947, Chairman Denny indicated that the Commission's national ownership rules were open to question.

> I do not think we have by any means devised a perfect rule when we say that one person shall not own more than six FM stations and shall not own more than five television stations. It is a tentative rule at the moment. Anyone who comes in and shows good reasons for changing it, up or down, will be given consideration.[146]

Finally, although Commissioner Hennock favored the Seven Station Rule, she expressed the opinion that regional concentration of ownership "may often have a more deleterious effect on competition . . . than the ownership in excess of the permitted maximum scattered throughout the United States."[147]

E. *Recent Considerations*

As technology has allowed for an ever increasing number of radio channels, the scarcity premise, on which traditional government regulation has rested, is becoming less tenable.[148] Recent FCC actions have been directed toward an almost total deregulation of the cable industry.[149] In addition, the FCC has proposed to allow for the development of direct broadcast satellite services[150] and movement into the low power TV area.[151] The Commission's actions are aimed at minimizing the "scarcity" of communication channels receivable in the average American home.

The future of the FCC's Seven Station and Duopoly Rules (limitation on ownership within a market) in such a changing environment has been questioned by the NAB.

> [The Satellite Television Corp.] asks the Commission to give it something no other broadcaster is permitted to have—multiple broadcast channels in every market in the country. [NAB] has strongly urged that all ownership restrictions be removed from broadcast television, cable and [satellite] TV. If this is done, then NAB believes that [Direct Broadcast Satellite] operators should also be free of such restrictions.[152]

The NAB argues that as long as the Commission applies the multiple ownership rules to current, terrestrial broadcasters, the rules must apply evenhandedly to all broadcasters. The Commission's need for any type of regulation

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146. *Id.* at 70.

147. *See* Report and Order in Docket No. 8967, 18 F.C.C. 288, 299 (1953).

148. *See* B. OWEN, *supra* note 41, at 106-07. Owen suggests that the spectrum is not in "scarce supply" to any greater extent than steel, plastic, or pencils.

149. *See generally* Order in Docket No. 21284, 67 F.C.C.2d 262 (1978). Additionally, great expansion in the area of cable radio is likely to occur within the next five to ten years.

150. *See* Memorandum Opinion and Order in General Docket No. 80-603, 88 F.C.C.2d 1 (1981). *See also* Notice of Proposed Policy Statement and Rulemaking in General Docket No. 80-603, FCC 81-181, 46 Fed. Reg. 30124 (1981) (to be codified in 47 CFR §§ 2, 23, 94) [hereinafter cited as *DBS Notice*].

151. *See* Inquiry Into the Future of Low-Power Television Broadcasting and Television Translators in the National Telecommunications System, 45 Fed. Reg. 69,178 (1980) (to be codified in 47 CFR § 73).

152. *See* National Association of Broadcasters' Petition to Deny, In re Application of Satellite Television Corporation in General Docket No. 80-603 at 64-65 (July 16, 1981).

in radio has been greatly decreased by the great expansion of other competitive outlets.[153]

The divergent views that have been expressed concerning the Seven Station Rule illustrate the need to formulate policy alternatives that should be considered by the Commission in determining the future of the Rule. The following section is this author's outline of seven policy alternatives. The alternatives will then be discussed and analyzed, with the conclusion that Alternative 3 should be adopted.

VI. POLICY ALTERNATIVES

The policy alternatives available to the Commission in dealing with the Seven Station Rule are:

1. Leave the standard as is, limiting national ownership to seven AM stations and seven FM stations.
2. Modify the standard to allow for the ownership of fourteen radio stations on a nationwide basis without regard to station type (AM, FM).
3. Modify the standard to allow one entity to own the same percentage of stations nationally in 1982 as they were allowed to do when the Rule was promulgated in 1953. This would allow for the ownership of thirty-six radio stations nationally regardless of station type.[154]
4. Modify the standard to allow one entity to own the same percentage of radio stations nationally as television stations. Adoption of this approach would allow for ownership of seventy-two radio stations on a national basis.[155]
5. Eliminate all arbitrary standards (Seven Station Rule) with respect to national concentration in the radio broadcast industry. This would allow an *ad hoc* determination as to whether an expanding radio station group's newest purchase is in the public interest.
6. Utilize the merger guidelines provided by the Justice Department to determine when a radio station merger would not be in the public interest.[156]
7. Limit national radio station ownership with a population standard similar to the ones proposed by Senators White and Bricker that establishes a constraint on a single entity's owner-

153. *See generally* Comments of the National Association of Broadcasters, In the Matter of Deregulation of Radio in Docket No. 79-219 at 17, 21, 22, 30, 31 (Mar. 25, 1980); Reply Comments of the National Association of Broadcasters, In the Matter of Deregulation of Radio in Docket No. 79-219 at 28, 56, 57 (June 25, 1980) [hereinafter cited as Reply Comments].

154. In 1953, there were 3,032 licensed radio station in operation. Since one entity could own 14 of these stations (seven AMs and seven FMs), one entrepreneur could have legally controlled .46% of all commercial radio stations nationally. BROADCASTING, Dec. 1953. Today (1982) there are 7,937 licensed radio stations in operation. Control of .46% of all commercial radio stations in operation in 1982 translates into 36 stations nationwide.

155. One entity is allowed to control seven TV stations nationally. Today there are 763 licensed commercial television stations in operation. Consequently, one entrepreneur can own .917% of the operational commercial TV stations. If radio entrepreneurs were allowed to control .917% of the commercial radio stations in operation, they would be allowed to own 72 stations nationwide.

156. *See infra* note 160.

ship by the percentage of United States population that the stations' signals can reach. The upper limit proposed by White and Bricker was twenty-five percent.

VII. POLICY RECOMMENDATIONS AND CONCLUSIONS

This paper has focused on whether the Seven Station Rule still represents a valid approach to regulating the radio industry. In this author's opinion, the Seven Station Rule as it now stands (Alternative 1) needs to be modified to minimize unnecessary FCC intrusion into the investment decisions of radio broadcasters. As the Circuit Court of the District of Columbia indicated in *Churchill Tabernacle v. FCC*,[157] "the Commission should go no further than is reasonably necessary to correct the evil. . . ."[158] The dilemma is to determine where to draw the line between "necessary" and "unnecessary" FCC action. The policy concern behind FCC action is with national concentration in the radio broadcasting industry, and therefore, "necessary" FCC action would promote competition. However, the great increase in the number of operating stations, and therefore competition, since 1953 when the Seven Station Rule was promulgated, suggests that concerns about "monopoly" and "diversification" in the radio industry must be considerably less significant today.[159] The FCC recently recognized these great changes in the radio industry and instituted some deregulation.

> As we stated in the *Notice, it is our concern that regulation should be kept relevant to technology and an industry that has been characterized from its beginning by rapid and dynamic change*. In less than fifty years, broadcast radio has grown from an infancy of 583 stations in 1934 to a maturity of nearly 9000 [commercial and noncommercial] stations today. . . . [P]olicies that may have been necessary in the early days of radio may not be necessary in an environment where thousands of licensees offer diverse sorts of programming and appeal to all manner of segmented audiences. *We believe, therefore, that the Commission is justified in reviewing its regulations in the face of such fundamental changes as have occurred since the dawn of radio regulation in this country*. Indeed, failure to do so could constitute less than adequate performance of our regulatory mission.[160]

Evaluation of the FCC's rationale for establishing the Seven Station Rule in light of changed conditions suggests that the Rule limits national ownership of radio stations far beyond anything envisioned in the antitrust laws.[161] The Rule may in fact have resulted in less diversity of viewpoints at the national level than would have been present under a less restrictive stan-

157. 160 F.2d 244 (D.C. Cir. 1947).

158. *Id.* at 248.

159. *See* Loevinger, *Media Concentration: Myth and Reality*, 24 ANTITRUST BULL. 479, 484-93 (1979); *Media Concentration, supra* note 58, at 417-19, 426; *see also supra* Tables 1 through 5.

160. *See* Deregulation of Radio, 46 Fed. Reg. 13,888 (1981) (to be codified in 47 C.F.R. §§ 0, 73) [hereinafter cited as Deregulation of Radio] (emphasis added).

161. Baker, *supra* note 94, at 653, indicates that the Seven Station Rule goes further to promote diversity of control than "antitrust would dictate, or could dictate." The best information regarding the Justice Department's definition of what constitutes an anticompetitive merger is found in Department of Justice Merger Guidelines 2 TRADE REG. REP. (CCH) ¶ 4430 (1968).

dard.[162] This argument is based on the premise that the economies of scale that are present in group-ownership situations will allow diversity in radio station programs. It is economically more feasible for a group owner to offer less profitable radio programs with smaller audiences than an owner of a single radio station. Some increase in the present fourteen station limit on radio ownership would arguably not create a negative impact on competition or diversity in the current radio industry.[163] However, that increase must be reasonable. Alternative 3, which retains the same national percentage as existed when the Rule was promulgated, appears to be a reasonable increase.

The large increase in radio station competitors on a national basis renders most of the other arguments forwarded by the Commission for the Rule moot. Specifically, it is difficult to understand how one could characterize AM and FM radio frequencies as particularly "scarce" in today's market environment.[164] Similarly, the media power rationale for regulating radio is not as strong an argument today as it was in 1953 due to the substantial increase in the number of radio stations.[165]

In addition, the argument that the Seven Station Rule (Alternative 1) is needed to protect small broadcasters from the bargaining advantages possessed by station groups appears to be weak in view of the changes in the radio industry. This argument is concerned with the fear that ownership of more than fourteen radio stations nationally will confer an excessive amount of market power on a group owner.[166] Ownership of more than fourteen stations in geographically dispersed markets throughout the United States could not be expected to confer excessive amounts of market power on a

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In a market in which the shares of the four largest firms amount to approximately 75% or more, the Department will ordinarily challenge mergers between firms accounting for, approximately, the following percentages of the market:

Acquiring Firm	Acquired Firm
4%	4% or more
10%	2% or more
15% or more	1% or more

[If the] shares of the four largest firms amount to less than approximately 75%, mergers are challenged along the following lines:

Acquiring Firm	Acquired Firm
5%	5% or more
10%	4% or more
15%	3% or more
20%	2% or more
25% or more	1% or more

Id.

162. This is suggested by Parkman, *An Economic Analysis of the FCC's Multiple Ownership Rules*, 31 AD. L. REV. 205, 217-20 (1979).

163. *See Media Concentration, supra* note 58, at 417-19, 426; Rosse, *supra* note 5, at 188. The primary issues regarding concentration are with respect to national competition. The FCC has rules in place to deal with regional concentration and with local competition. Additionally, even if the Commission set its ownership limits too high in this area, the public interest of preventing monopolies and undue concentration would still be protected by the antitrust laws.

164. *See* B. OWEN, *supra* note 41, at 106-07; Loevinger, *supra* note 159.

165. *See* Deregulation of Radio, *supra* note 160, at 13,893; *Media Concentration, supra* note 58, at 417-19, 426.

166. *See supra* note 67.

radio station group.[167] Inasmuch as the average radio station in this country faces tremendous competition not only from other radio stations but also from television stations, daily newspapers, cable television, and radio station groups that are considerably larger than those presently allowed could not be expected to either possess or exercise market power in the national media market.[168]

The FCC's final substantive rationale for the Seven Station Rule (Alternative 1), that utilization of an arbitrary upper limit on ownership is a fairer, more efficient procedure than an *ad hoc* approach, is arguably the primary intent behind the Commission's promulgation of the Rule.[169] The regulatory efficiency of establishing an arbitrary upper limit on national radio station ownership with which to evaluate prospective licensees cannot be disputed.[170] On the other hand, the fairness of the procedure depends on where the limit is set.[171] The substantial increase in the number of radio stations nationally would suggest that conditions have changed such that the present arbitrary limits can be safely liberalized.[172]

The rationale provided by other parties in support of some type of fixed upper limit on national ownership of radio stations does not differ substantially from those provided by the FCC. Congress, the Justice Department, and Dean Barrow all express the fear that failure to limit the number of broadcasting stations that can be controlled by one entity nationally will lead to concentration of control, which runs counter to the public interest, convenience, and necessity.[173] These concerns are unfounded in light of the substantial increase and changes in the American commercial radio industry.[174]

The opponents of the Seven Station Rule argue that the Rule is arbitrary because: 1) it ignores all of the facts relevant to determining if ownership of more than fourteen radio stations nationally is in the public interest,[175] and 2) the Rule was promulgated for administrative convenience and expedience rather than to promote competition and diversification.[176] Both contentions have merit. However, dealing with national concentration

167. *Id. See also Media Concentration, supra* note 58 at 417, 424-25; *supra* note 72 and accompanying text.

168. *See supra* note 72; Loevinger, *supra* note 159; Reply Comments, *supra* note 153, at 28, 56, 57. Also note the relatively low profitability experienced by the average radio station in *supra* notes 68 and 69 and accompanying text.

169. *See* Brief for Petitioners, *supra* note 33, at 36-37.

170. Clearly defined limits of this sort save large amounts of time and money for both the FCC and for broadcasters. Conversely, a case-by-case approach would necessarily involve the Commission in lengthy hearings whenever this issue is raised.

171. Setting a limit which is too low leads to an unnecessary restriction on entrepreneurs. If no "evil" would occur under a higher limit, society is being protected from an imaginary negative force. Conversely, if the limit is too liberal, anticompetitive practices might result. The antitrust laws set the line for the average business in this country with respect to national concentration. *See* Baker, *supra* note 94, at 653; Deregulation of Radio, *supra* note 160.

172. *See* Deregulation of Radio, *supra* note 160.

173. *See* the comments made by these parties, *supra* notes 86-93.

174. *See Network Broadcasting, supra* note 96, at 606; authorities cited *supra* note 167; and Martin, *supra* note 67.

175. *See* Brief for Respondent, *supra* note 6, at 23-25.

176. *See supra* note 122 and accompanying text.

issues on a case-by-case basis could be an expensive and time-consuming process.[177] Setting an upper limit on the number of radio stations that can be controlled by one entity may be the most efficient method of dealing with national concentration of ownership.[178] However, the manner in which the Commission set the upper limit on ownership was totally arbitrary.[179] At a minimum, the Commission should have been more explicit with respect to how it arrived at the upper limits selected.[180] Failure to do so has made obtaining a waiver of the Rule functionally impossible.[181] Consequently, the best approach would be to establish realistic and fair national ownership limits that can be waived upon proper showing.[182] Alternative 3 offers a realistic and fair national ownership limit, while retaining the efficiency of having a maximum limit on ownership.

Policy alternatives 1, 2, 4, 5, 6, and 7, outlined above, should be rejected for a variety of reasons. Policy Alternatives 1 and 2 are rejected as being unnecessarily restrictive with respect to private investment decisions. As previously discussed, failure to make some modification in the Seven Station Rule based on the extensive changes that have taken place in the radio industry would not be in the public interest.[183] Policy Alternative 4 is rejected only because it would allow for too large an increase in national radio station ownership without prior Commission experience.[184] After the Commission has had some experience with expanded national radio station ownership it will be in a better position to evaluate whether further general expansion would be consistent with the public interest.[185] Adoption of policy Alternatives 5 and 6, outlined above, would be very desirable. The Commission could not be accused of abrogating its duty regarding national concentration issues by taking a traditional antitrust approach to the problem.[186] However, adoption of this approach would create a high degree of uncertainty among broadcasters and at the Commission. Such antitrust considerations should certainly become relevant if, and when, a broadcast group petitions

177. It is difficult to estimate the costs of this type of litigation for both the Commission and the private parties involved. *See* Changes in the Entertainment Formats of Broadcast Stations, 37 R.R. 2d 1679, 1686-87 (1976), for the Commission's estimate of the costs involved in the proceedings of Citizens Committee to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974).

178. *See* Brief for Petitioners, *supra* note 33, at 36-37.

179. *See* the exchange between Wayne Coy, then Chairman of the FCC and Paul O'Bryan in Oral Arguments in Docket No. 8967, 182 (Jan. 17, 1949).

180. *See* Supplemental Brief, *supra* note 120, at 11. *See also supra* notes 50-53 and accompanying text.

181. The fear expressed by Storer in its Supplemental Brief, *supra* note 120, at 19, turned out to be well founded since the Commission has never waived the Seven Station Rule. *See* Further Notice of Proposed Rule Making in Docket No. 20548, 63 F.C.C.2d 832, 834 (1977).

182. *See* United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956).

183. *Id. See supra* notes 67 and 159.

184. The Commission's lack of experience in increased radio ownership is apparent from the fact that the Seven Station Rule has remained intact since 1953.

185. The slower expansion envisioned in the thirty-six-station approach is more consistent with the operational definition of "reasonable" provided for in *supra* note 32, than the seventy-two-station approach.

186. *See generally* Celler, *supra* note 89; Mahaffie, *Mergers and Diversification in the Newspaper, Broadcasting and Information Industries*, 13 ANTITRUST BULL. 927 (1968); and Barrow, *Antitrust and the Regulated Industry: Promoting Competition in Broadcasting*, 1964 DUKE L.J. 282.

the FCC to waive its national ownership rule.[187] However, administrative efficiency considerations weigh heavily against the adoption of a case-by-case approach, and thus, these alternatives are rejected.[188] Finally, limiting national ownership by utilization of the percentage of population approach suggested in Policy Alternative 7, above, would be very difficult to administer.[189] The most bizarre problem that could occur under a population approach is that a station group that was within the population guideline when it was formed could result in a violation of the rule if extensive growth occurred in the markets covered by the group.

FCC adoption of policy Alternative 3, as outlined above, would represent a realistic and fair solution to the problem at hand. This approach is compelling for two reasons. First, the radio industry is extremely competitive both nationally and locally. Allowing one entrepreneur to own the same percentage of the nearly 8,000 operating commercial radio stations as was allowed in 1953 cannot possibly create unlawful concentration in the national media market.[190] Second, this approach will maintain an efficient method for dealing with national media concentration issues.[191]

Additionally, it is recommended that the FCC not view this new standard as unwaivable.[192] The selection of any numeric national ownership standard is necessarily arbitrary.[193] Failure to waive what is admittedly an arbitrary standard is the ultimate in administrative inflexibility, particularly in a dynamic marketplace.[194]

In sum, the FCC must reexamine its Seven Station Rule. As the Supreme Court opinion in *Storer Broadcasting* noted: "If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations."[195] Circumstances have clearly changed in the radio industry. Increasing the upper limit on national radio station ownership from fourteen to thirty-six, as outlined in Alternative 3 above, would be consistent with the radio deregulation already instituted by the Commission.[196] The time has finally come for the FCC to modify its "ultimate multiple ownership regulation."[197]

187. The guidelines provided in *supra* note 161, would undoubtedly become relevant to any petition to waive the Commission's national ownership rule.

188. *See supra* note 177.

189. *See* the comments of FCC Chairman Denny in *Hearings on S. 1333, supra* note 87, at 62-65, and the comments of Commissioner Jett at 65-66.

190. *See supra* notes 67-69, and 159.

191. *See* Brief for Petitioners, *supra* note 33, at 36-37.

192. *See* Supplemental Brief *supra* note 120, at 19; United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956).

193. *See supra* notes 178 and 179 and accompanying text.

194. *See supra* note 160 and accompanying text.

195. 351 U.S. 192, 205 (1956).

196. *See* Deregulation of Radio, *supra* note 160.

197. *See* Further Notice of Proposed Rule Making in Docket No. 20548, 63 F.C.C.2d 832, 834 (1977).

METROMEDIA, INC. V. CITY OF SAN DIEGO: A FIRST AMENDMENT ANALYSIS OF GOVERNMENTAL SUPPRESSION OF SPEECH

INTRODUCTION

On March 14, 1972, the San Diego City Council adopted an ordinance which substantially prohibited the erection of off-site "outdoor advertising display signs" within the city.[1] In addition to on-site[2] commercial signs the ordinance permitted government signs, bench signs, commemorative plaques, religious symbols, signs within shopping centers not visible beyond the premises, real estate signs, public service signs depicting time, temperature or news, signs on vehicles, and temporary off-premises subdivision directional signs.[3] The city council later amended the ordinance to exempt "temporary political campaign signs."[4] The declared purposes of the ordinance included the intent "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and to "preserve and improve the appearance of the city."[5]

In *Metromedia, Inc. v. City of San Diego*,[6] the plaintiffs were engaged in the outdoor advertising business in San Diego. They challenged the constitutionality of the ordinance and sued to enjoin its enforcement. The trial court granted the plaintiffs' motion for summary judgment.[7] The Court of Appeals, Fourth Appellate District, affirmed the trial court.[8] The California Supreme Court reversed, holding that the ordinance did not violate first amendment guarantees.[9]

The United States Supreme Court reversed[10] in a decision that was unable to muster a majority in support of a single rationale. The ordinance was declared unconstitutional on its face due to its impermissible restrictions on noncommercial speech.

This comment will examine the different approaches the Supreme Court has developed to assess the constitutionality of governmental suppression of both commercial and noncommercial speech. An analysis of the ways in which these approaches were applied in *Metromedia* will follow. The com-

1. SAN DIEGO, CAL., CODE § 101.0700(B) (1972). Off-site signs are those that do not identify a use, facility, or service located on the premises or a product that is produced, sold, or manufactured on the premises. San Diego, Cal., Ordinance 10,795 (Mar. 14, 1972).

2. On-site signs are defined as those "designating the name of the owner or occupant of the premises upon which signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed." SAN DIEGO, CAL., CODE § 101.0700 (1972).

3. San Diego, Cal., Ordinance 10,795 (Mar. 14, 1972).

4. San Diego, Cal., Ordinance 12,189 (Oct. 19, 1977).

5. SAN DIEGO, CAL., CODE § 101.0700(A) (1972).

6. 453 U.S. 490 (1981).

7. *Id.* at 497.

8. *Id.*

9. 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), *rev'd*, 453 U.S. 490 (1981).

10. 453 U.S. at 521.

ment will conclude with an examination of the inherent difficulties in these approaches and a look at the way the Court would analyze a case in which a total prohibition of billboard advertising is presented.

I. CLASSIFICATIONS OF GOVERNMENTAL SUPPRESSION OF SPEECH

A. *Regulation Based on the Time, Place, or Manner of Speech*

The first amendment does not guarantee the right to communicate at all times, places, or in any manner.[11] The Supreme Court has held that the first amendment allows reasonable regulations of constitutionally protected speech where necessary to further significant governmental interests.[12] The essence of these regulations lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate government goals.[13] "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[14]

The Court established three criteria for reviewing such regulations in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[15] Restrictions on the time, place, and manner of speech are permissible provided that the ordinance is content-neutral, serves a significant government interest, and leaves open adequate alternative channels of communication.[16] In *Consolidated Edison Co. v. Public Service Commission*[17] the Court allowed a public utility company to include inserts discussing controversial issues of public policy in its monthly bills. The Court reaffirmed its position that a valid time, place, and manner restriction "may not be based either upon the content or subject matter of the speech."[18]

The most recent application of the time, place, and manner restriction occurred in *Heffron v. International Society for Krishna Consciousness, Inc.*[19] The Court determined that a state may require a religious organization desiring to distribute religious literature at a state fair to conduct those activities only at an assigned location, even though this limited the religious practices of the organization.

B. *Regulation of Speech Based on Content*

A regulation of the time, place, or manner of speech may be imposed so

11. Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981). *See infra* text accompanying note 19.

12. Young v. American Mini Theatres, Inc., 427 U.S. 50, 64 n.18. *See infra* text accompanying notes 32-34.

13. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980). *See also* Erzonoznik v. City of Jacksonville, 422 U.S. 205 (1975), where the Court stated that in order to survive a constitutional attack such regulations must be narrowly tailored.

14. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

15. 425 U.S. 748 (1976).

16. *Id.* at 771. *See also* Grayned v. City of Rockford, 408 U.S. 104 (1972), where an anti-noise ordinance survived constitutional attack because it was sufficiently tailored and did not unduly interfere with first amendment rights.

17. 447 U.S. 530 (1980).

18. *Id.* at 536.

19. 452 U.S. 640 (1981).

long as it is reasonable.[20] However, when the regulation is based on the content of speech, the governmental action must be more carefully scrutinized to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views."[21] Governmental action that regulates speech on the basis of its subject matter "slip[s] from the neutrality of time, place, and circumstance into a concern about content."[22]

In *Erznoznik v. City of Jacksonville*,[23] the Court invalidated an ordinance prohibiting the exhibition of motion pictures displaying nudity at drive-in theatres with screens visible from a public street because that the ordinance regulated expression on the basis of content.[24] In *Linmark Associates, Inc. v. Township of Willingboro*,[25] the Court struck down an ordinance prohibiting the placement of "for sale" and "sold" signs in front of residential dwellings. The Court reasoned that the ordinance banned only signs carrying a specific message rather than all signs of a certain size, shape, or location and, therefore, related to the content of speech.[26]

As a general rule "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[27] However, government regulations based on subject matter have been approved in narrow circumstances. In *Greer v. Spock*[28] the Court upheld the prohibition of partisan political speech on a military base even though civilian speakers had been allowed to lecture on other subjects.[29] In *Lehman v. City of Shaker Heights*[30] the plurality permitted a city transit system that rented space in its vehicles for commercial advertising to refuse to accept partisan political advertising.[31] These are narrow exceptions because both cases involved regulation of speech in government-created forums.

C. *Prohibition of a Particular Medium of Communication*

The distinction between regulation and total prohibition of speech was recognized in *Young v. American Mini Theatres, Inc.*[32] The Court held that a zoning ordinance banning adult book stores, movies, and bars did not constitute an invalid prior restraint violative of the first amendment or the equal protection clause of the fourteenth amendment.[33] The Court noted that the ordinance was not a flat prohibition on the operation of adult movie theatres

20. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980).
21. Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring).
22. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99 (1972) (quoting Kalven, *The Concept of the Public Forum*: Cox v. Louisiana, 1965 SUP. CT. REV. 29).
23. 422 U.S. 205 (1975).
24. *Id.* at 211-12.
25. 431 U.S. 85 (1977).
26. *Id.* at 93-94.
27. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).
28. 424 U.S. 828 (1976).
29. *Id.* at 838.
30. 418 U.S. 298 (1974).
31. *Id.* at 302.
32. 427 U.S. 50 (1976).
33. *Id.* at 60.

within the city and cautioned that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech."[34]

In *Schneider v. Arizona*[35] absolute bans on handbill distribution were held unconstitutional notwithstanding claims of municipalities that the aim of the legislation was the prevention of littering. In *Jamison v. Texas*[36] the Court declared that "[t]he right to distribute handbills concerning religious subjects on the streets may not be prohibited at all times, at all places, and under all circumstances."[37] In *Martin v. City of Struthers*[38] a flat prohibition of door-to-door solicitation was held unconstitutional. In *Kovacs v. Cooper*,[39] although no opinion commanded a majority of the Court, three members of the plurality observed that an "[a]bsolute prohibition" on sound trucks was "probably unconstitutional."[40] Three others concluded their dissent on grounds that the statute in fact constituted just such "an absolute and unqualified prohibition" of sound trucks.[41]

Most recently, the total prohibition question was addressed in *Schad v. Borough of Mount Ephraim*.[42] In striking down a total ban on live entertainment the Court assessed "the substantiality of the governmental interests asserted" and "whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment."[43]

D. *Regulation of Commercial and Noncommercial Speech*

The Supreme Court first confronted the problem of determining the first amendment status of commercial speech in *Valentine v. Chrestensen*.[44] The Court held that the first amendment does not protect purely commercial speech.[45] Purely commercial advertisement of goods or services remained outside of first amendment protection until *Bigelow v. Virginia*.[46] The Court concluded that an advertisement which contained factual information pertaining to an issue of public concern outweighed a state's interest

34. *Id.* at 71 n.35.
35. 308 U.S. 147 (1939).
36. 318 U.S. 413 (1943).
37. *Id.* at 416.
38. 319 U.S. 141 (1943).
39. 336 U.S. 77 (1949).
40. *Id.* at 81-82.
41. *Id.* at 101 (Black, J., dissenting).
42. 452 U.S. 61 (1981).
43. *Id.* at 68-70.
44. 316 U.S. 52 (1942). The defendant was convicted of distributing commercial advertising handbills in violation of a local anti-litter ordinance prohibiting commercial leafletting in the streets. *Id.* at 53 n.1.
45. The Court determined that the primary purpose of the speech was commercial and held that addition of a political message on the back of the leaflet would not elevate it to a constitutionally protected status. *Id.* at 55. The Court later abandoned the primary purpose test in favor of a content analysis. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
46. 421 U.S. 809 (1975). The Court reversed the conviction of a Virginia newspaper that had published an advertisement for a New York abortion referral service in violation of a Virginia statute which prohibited ads that encouraged abortion.

in suppressing speech.[47]

Although the Court recognized that the first amendment protects commercial speech, it was quick to point out that commercial speech does not merit the same degree of protection as noncommercial speech. Speech which proposed no more than a commercial transaction was entitled to first amendment protection in *Virginia Pharmacy Board*. A Virginia statute prohibiting price advertising by pharmacists was held unconstitutional. The Court recognized, however, that "common-sense differences" between commercial and other forms of speech "suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired."[48]

In *Bates v. State Bar of Arizona*[49] the Court relied on the teachings of *Virginia Pharmacy Board* to prevent Arizona from prohibiting truthful and legitimate price advertisements of legal services and again recognized the "common-sense differences" between commercial and noncommercial speech.[50] One year later in *Ohralik v. Ohio State Bar Association*,[51] the Court upheld the suspension from practice of an attorney for face-to-face solicitation of business for pecuniary gain.[52] Justice Powell, writing for the Court, stated that commercial speech was afforded "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values."[53]

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[54] a New York State Public Service Commission regulation which prevented electric utilities from advertising the use of electricity was held invalid. The Court reaffirmed the conclusion reached in *Ohralik*,[55] stating that the Constitution accords "a lesser protection to commercial speech than to other constitutionally guaranteed expression" and added that "[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."[56]

The Court then adopted a four-part test for determining the validity of government restrictions based on the content of commercial speech.[57] The first amendment protects only commercial speech which concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it seeks to implement a substantial governmental interest, directly advances that interest, and reaches no further than necessary to accomplish the given objective. The Commission's regulation was

47. The existence of the New York referral service was considered "not unnewsworthy." *Id.* at 822.

48. 425 U.S. at 771 n.24. *See supra* notes 15-16 and accompanying text.

49. 433 U.S. 350 (1977).

50. *Id.* at 380-81.

51. 436 U.S. 447 (1978).

52. These activities were referred to as "classic examples of 'ambulance chasing.'" 436 U.S. at 469 (Marshall, J., concurring).

53. 436 U.S. at 456.

54. 447 U.S. 557 (1980).

55. *See supra* text accompanying notes 51-53; *see also* Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

56. 447 U.S. at 563.

57. *Id.* at 563-66.

overturned, therefore, because the suppression of speech was more extensive than necessary to further New York's interest in energy conservation.

Finally, *Metromedia, Inc. v. City of San Diego*[58] presented the Court with a situation in which a billboard regulation distinguished between commercial and noncommercial speech. The ordinance was invalidated because commercial speech was afforded greater protection than noncommercial speech.

II. *METROMEDIA, INC. V. CITY OF SAN DIEGO*

A. *Procedural History*

The trial court found the San Diego ordinance to be an unconstitutional exercise of the city's police power and an abridgment of Metromedia's first amendment rights.[59] The California Court of Appeal affirmed on the first ground without reaching the first amendment issue.[60]

The California Supreme Court reversed on the ground that a city's interest in either traffic safety or aesthetics justifies exercise of the police power.[61] The ordinance, however, was analyzed only in terms of its effect on commercial speech. In dismissing the first amendment challenge, the court relied on the United States Supreme Court's summary dismissals of appeals in three cases upholding billboard regulation ordinances.[62]

The United States Supreme Court noted probable jurisdiction to hear Metromedia's appeal.[63] The Court was thus presented with its first opportunity to provide guidance for assessing the relation between the first amendment interest of billboard advertisements and a city's interest in traffic safety and aesthetics.

B. *Metromedia's Position*

Metromedia argued that the ordinance was invalid on first and fourteenth amendment grounds because it would result in the total ban of outdoor advertising in San Diego.[64] Metromedia pointed out that San Diego agreed that "many businesses, politicians, and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive."[65] The ordinance, Metromedia urged, would effectively eliminate an entire medium of communication.

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58. 453 U.S. 490 (1981).

59. Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), *rev'd*, 453 U.S. 490 (1981).

60. *Id.*

61. *Id.*

62. *See* Newman Signs, Inc. v. Hielle, 440 U.S. 901 (1979); Suffolk Outdoor Advertising Co. v. Hulse, 439 U.S. 808 (1978); Markham Advertising Co. v. Washington, 393 U.S. 316 (1969). These cases were dismissed for want of a substantial federal question.

63. 449 U.S. 897 (1980).

64. Brief for Appellants at 18-33, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

65. *Id.* at 33-45.

C. *The Holding*

Five separate opinions were written. Justice White wrote the plurality opinion in which Justices Stewart, Marshall, and Powell joined. The plurality applied the four-part test in *Central Hudson* and found the ordinance to be valid insofar as it regulated commercial speech.[66] The ordinance, however, was declared unconstitutional under the first and fourteenth amendments.[67] Stating that noncommercial speech deserves greater protection than commercial speech, the Court held that the ordinance inverts this rule by affording a greater degree of protection to commercial than to noncommercial speech.[68]

Justice Brennan, writing a concurring opinion in which Justice Blackmun joined, took the position that the practical effect of the ordinance was to eliminate billboards as an effective medium of communication in San Diego.[69] By applying the *Schad* test, Justice Brennan found that the city failed to establish adequate traffic safety and aesthetic justification for a total prohibition of speech.[70] The concurring justices concluded that a city could totally ban billboards if it showed the ban would further a "sufficiently substantial governmental interest."[71]

The dissenting justices held that an absolute ban on billboard advertising, whether limited to commercial advertising or extending to all messages, was within the legitimate authority of local governments. However, each felt the need to write a separate opinion. Chief Justice Burger, citing *Heffron*, argued that nothing in the first amendment prevents such a ban.[72] Justice Stevens relied on *Kovacs* to reach the same conclusion.[73] Justice Rehnquist agreed substantially with the views of the Chief Justice and Justice Stevens,[74] adding that aesthetic justification alone was sufficient to sustain a total billboard ban.[75]

III. ANALYSIS OF THE COURT'S RATIONALE

Metromedia presented the Supreme Court with its first opportunity to assess the relationship between the first amendment interest in billboard advertising and a municipality's interest in traffic safety and aesthetics.[76] The case also presented the Court with the opportunity to provide some much needed clarification of the different first amendment protections afforded to commercial and noncommercial speech. The plurality focused on the latter question while the rest of the Court focused on the former. The result was

66. 453 U.S. at 512. *See supra* text accompanying notes 54-57.
67. *Id.* at 521.
68. *Id.*
69. *Id.* at 525-26 (Brennan, J., concurring).
70. *Id.* at 528. *See supra* text accompanying notes 42-43.
71. *Id.*
72. *Id.* at 566 (Burger, C.J., dissenting). *See supra* text accompanying note 19.
73. *Id.* at. 550-51 (Stevens, J., dissenting). *See supra* text accompanying notes 39-41.
74. *Id.* at 569 (Rehnquist, J., dissenting).
75. *Id.* at 570. *See also* Berman v. Parker, 348 U.S. 26 (1954).
76. *See* Aronovsky, Metromedia, Inc. v. City of San Diego: *Aesthetics, the First Amendment, and the Realities of Billboard Control*, 9 ECOLOGY L. Q. 295-339 (1981).

that neither issue received consideration by the entire Court. As Justice Rehnquist concluded, "it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definite principles can be clearly drawn. . . ."[77]

It was anticipated that the Court in *Metromedia* would provide guidance for municipalities contemplating the constitutionality of various billboard ordinances. Four of the five opinions provided some guidance. Unexpectedly, the case was resolved through an analysis of commercial and noncommercial speech. The precedential holding of *Metromedia* is that commercial speech must not be afforded greater first amendment protection than noncommercial speech. This concept is not novel and fits neatly into the line of commercial speech cases. It is significant, however, that the Court is still unprepared either to define what speech is "commercial" or "noncommercial" or simply to declare that all truthful speech should be afforded equal first amendment protection.

The more important aspect of this case is that it presents a good illustration of the difficulties and inconsistencies which have resulted from the evolution of four different methods of analyzing the single issue of governmental suppression of speech. This discussion examines the way these approaches were applied in *Metromedia*. While it agrees with the plurality's analysis and with its determination that the constitutionality of a total ban on billboards was not presented in this case, it looks at the way in which the entire Court might analyze such a case if it arises.

A. *Analysis of the Ordinance as a Distinction Between Commercial and Noncommercial Speech*

The plurality noted that the Court has "consistently distinguished between the constitutional protection afforded commercial as opposed to noncommercial speech,"[78] and separately considered the impact of the ordinance on both types of speech. The ordinance was found to be valid insofar as it regulated commercial speech. However, the ordinance was declared invalid under this analysis because commercial speech was permitted in situations where noncommercial speech was prohibited.

The *Central Hudson* test was applied to determine the constitutionality of the regulation on commercial speech.[79] The plurality recognized that traffic safety and the appearance of the city are "substantial governmental goals"[80] and agreed with the "accumulated, common-sense judgments of local lawmakers and of the many reviewing courts"[81] that elimination of billboards reasonably relates to traffic safety. The ordinance was found to go no further than necessary to accomplish the city's objectives. The regulation of commercial speech was thus held to satisfy the requirements of *Central*

77. 453 U.S. at 569 (Rehnquist, J., dissenting).
78. 453 U.S. at 504-05.
79. *Id.* at 507. *See supra* text accompanying notes 54-57.
80. *Id.* at 507-08.
81. *Id.* at 509.

Hudson.[82]

The San Diego ordinance permitted an owner of a commercial establishment to erect a billboard only on his own property and only if that billboard advertised goods or services available on that property. The plurality observed that the effect of this ordinance was to permit commercial speech while prohibiting noncommercial speech. The plurality recalled the development of the law establishing that while commercial speech deserves first amendment protection, it does not merit the same degree of protection as that afforded noncommercial speech.[83] The plurality argued that the ordinance results in an inversion of this law by providing greater protection for commercial speech than for noncommercial speech.[84] The plurality thus determined that the ordinance was unconstitutional, stating "that by allowing commercial establishments to use billboards to advertise the products and services they offer, the city necessarily has conceded that some communicative interests, e.g., onsite commercial advertising, are stronger than its competing interests in aesthetics and traffic safety."[85]

It appears, therefore, that the plurality would uphold the constitutionality of an ordinance which bans commercial speech while allowing noncommercal speech. Justice Brennan, however, recognized that such an ordinance will continue to raise significant first amendment problems. An unacceptable amount of discretion would be left in the hands of city officials to determine whether a proposed message should be labeled commercial or noncommercial. Justice Brennan posed the question, "[m]ay the city decide that a United Automobile Workers billboard with the message 'Be a patriot—do not buy Japanese-manufactured cars' is 'commercial' and therefore forbid it? What if the same sign is placed by Chrysler?"[86]

Although Justice Brennan raised good questions, he did not offer any guidance in distinguishing between commercial and noncommercial speech. Neither did the plurality, even though it relied upon this distinction to invalidate the ordinance. *Metromedia* provided an opportunity to clarify the status of commercial speech within the hierarchy of first amendment values. The Court, however, avoided this issue. In *Central Hudson* Justice Rehnquist stated that "the Court unlocked a Pandora's Box"[87] when, in *Virginia Pharmacy Board*, it recognized different degrees of first amendment protection for commercial and noncommercial speech. Until the Court either defines its terms or declares all truthful communication, commercial and noncommercial, worthy of equal first amendment protection, "Pandora's Box" will remain open.

B. *Analysis of the Ordinance as a Content-Based Regulation*

The plurality recognized that the exceptions to the ordinance's general

82. *Id.* at 512.
83. *Id.* at 504-08.
84. *Id.* at 513-14.
85. *Id.* at 520.
86. *Id.* at 539 (Brennan, J., concurring).
87. 447 U.S. at 598 (Rehnquist, J., dissenting).

prohibition of billboards distinguishes between permissible and impermissible signs by reference to content.[88] The plurality, however, avoided performing a content analysis. Perhaps this is because it had already decided the case under a commercial/noncommercial speech analysis and wanted to ensure that its holding would not be clouded by a separate analysis. Or perhaps it was to avoid a discussion concerning whether the exceptions themselves are constitutional. The plurality did point out, however, that these content-based exceptions preclude the use of a time, place, and manner analysis.[89]

Justice Stevens stated that "the plurality focuses its attention on the exceptions from the total ban and, somewhat ironically, concludes that the ordinance is an unconstitutional abridgment of speech because it does not abridge enough speech."[90] This is simply an inaccurate account of the plurality's treatment of the case. The plurality did not focus its attention on these exceptions. It clearly performed an entirely different analysis.

C. *Analysis of the Ordinance as a Time, Place, or Manner Regulation*

Rather than participate in the plurality's discussion of the distinction between commercial and noncommercial speech, the remainder of the Court treated the case as a straightforward competition between the first amendment values of billboard advertising and a municipality's interest in traffic safety and aesthetics. In assessing this relationship, the justices were divided over whether the ordinance should be classified as a time, place, or manner regulation or as a total prohibition of a medium of communication. The classification is vital because it determines the analysis to be used.

Chief Justice Burger stated that "[i]t is not really relevant"[91] how the ordinance is classified. He argued that the Court should not simply select a classification and apply its corresponding analysis. However, as the plurality pointed out, "[t]hese 'labels' or 'categories' . . . have played an important role in this Court's analysis of First Amendment problems in the past. The standard THE CHIEF JUSTICE himself adopts appears to be based almost exclusively on prior discussions of time, place and manner restrictions."[92]

The Chief Justice addressed the basic question of whether a city may exercise its police power to eliminate billboards in the interests of traffic safety and aesthetics.[93] In answering in the affirmative, Chief Justice Burger relied on the time, place, and manner analysis in *Heffron*.[94] He concluded that traffic safety and aesthetics are legitimate governmental interests and that billboards frustrate those interests.[95] The Chief Justice contended that the exceptions to the general prohibition are content-neutral. He stated that the city "has not preferred any viewpoint and, aside from these limited ex-

88. 453 U.S. at 516.
89. *Id.* at 517.
90. *Id.* at 540 (Stevens, J., dissenting).
91. *Id.* at 556 (Burger, C.J., dissenting).
92. 453 U.S. at 518 n.23.
93. *Id.* at 557 (Burger, C.J., dissenting).
94. *Id.* at 566. *See supra* text accompanying note 19.
95. *Id.* at 565.

ceptions, has not allowed some subjects while forbidding others."[96]

There are two flaws with Chief Justice Burger's choice of the time, place, and manner analysis. First, while the intent of the legislators may not have been to favor certain subject matter over others, the result of the exceptions is such a discrimination. For example, certain religious symbols would be permitted while other symbols, not recognized as "religious" would be prohibited. The time, place, and manner cases hold that the effect of the legislation may determine whether a regulation is content-neutral.[97] The effect of the exception is discrimination based on content. This removes the ordinance from a time, place, and manner analysis.

The second flaw in the analysis is that it neglects the requirement of *Virginia Pharmacy Board* that alternative channels of communication remain open. As the parties stipulated, however, adequate alternate means of communication do not exist.[98] Whether or not Chief Justice Burger approves of the concept of these classifications, it is difficult to believe that *Heffron* may be legitimately applied in this case.

D. *Analysis of the Ordinance as a Total Prohibition of Speech*

Perhaps it is because "every regulation necessarily speaks as a prohibition,"[99] or that Justices Brennan, Blackmun, and Stevens were simply anxious to express their views on the subject, that they treated the case as presenting the total ban question. Justice Brennan argued that the exceptions to the ordinance do not alter the nature of the ban, the "practical effect" of which eliminates billboards as an effective medium of communication.[100] Despite their good intentions of wanting to provide guidance in these matters, it seems that these justices prematurely performed the total ban analysis. A genuine, as opposed to a practical, total ban situation is likely to arise eventually.

Classification of *Metromedia* as a total ban question is inappropriate for two reasons. First, the exceptions to the general ban are significant and substantial. By their very nature these exceptions should remove the ordinance from this analysis. Second, the justices who applied this analysis mistakenly equated the total elimination of a particular business with the total elimination of a particular medium of communication.[101] The fact that the outdoor advertising business in San Diego is eliminated does not necessarily mean that billboards are also eliminated. Billboards may exist independently of the advertising business.

Determining whether an ordinance is a prohibition or merely a regula-

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96. *Id.* at 564.

97. *See supra* text accompanying notes 20-22.

98. Joint Stipulation of Facts § 28, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

99. Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962).

100. 453 U.S. at 525-26 (Brennan, J., concurring).

101. "If enforced as written, the ordinance at issue in this case will eliminate the outdoor advertising business in the City of San Diego. The principal question presented is, therefore, whether a city may prohibit this medium of communication." *Id.* at 540 (Stevens, J., dissenting).

tion is at least as difficult as determining whether an ordinance is content-based. In *Kovacs* the question presented was whether an ordinance which regulated the use of "loud and raucous" sound trucks was, in fact, a regulation or a total ban.[102] Sound trucks are, by their nature, "loud and raucous." In *Metromedia* Justice Stevens stated that whether the ordinance in *Kovacs* was a regulation or a prohibition, it at least permits a city to enforce a rule that "curtails the effectiveness of a particular means of communication."[103]

IV. CONCLUSION

Despite the plurality's determination in *Metromedia* that traffic safety and aesthetics are "substantial governmental goals,"[104] it cannot be concluded that the plurality justices would allow either of these interests to uphold a total prohibition of billboard advertising. Justice Brennan argued that under these circumstances *Schad* is the appropriate test to apply. The city would have to prove that "a sufficiently substantial governmental interest is directly furthered by the total ban and that any more narrowly drawn restriction . . . would promote less well the achievement of that goal."[105] This would impose a much more difficult burden of proof on the city than it faced under the *Central Hudson* test which was applied only to determine the validity of restrictions on commercial speech. The "common-sense judgment" of a legislature which satisfied *Central Hudson* will not satisfy *Schad*.

If the city's interest in the ordinance is either traffic safety or aesthetics, *Schad* would require the city to prove that billboards actually do adversely affect traffic safety or to demonstrate that its interest in the aesthetics of industrial areas is sufficiently substantial to justify a total ban. These standards of proof would be extremely difficult to meet.[106]

If a case arises in which the total ban is unquestionably presented, there is little reason to believe that all of the justices will analyze the ordinance within the *Schad* framework. Justice Brennan is correct in his belief that the *Schad* test should be applied. *Kovacs* should not apply because it was questionable whether that ordinance constituted a regulation or a prohibition. The justices clearly pointed out that if the ordinance resulted in an absolute

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102. 338 U.S. at 78.

103. 453 U.S. at 550 (Stevens, J., dissenting). "If the First Amendment categorically protected the marketplace of ideas from any quantitative restraint, a municipality could not outlaw graffiti." *Id.*

104. 453 U.S. at 507-08.

105. *Id.* at 528 (Brennan, J., concurring).

106. The considerations of public safety and beauty as proffered by the state as a basis for prohibiting the speech signified by the [billboards] are mutually inconsistent. The argument is made that our residents are entitled to look at the beauty of the countryside, untrammeled by the blight of billboards, in the face of the statement that billboards can be banned because they constitute a distraction to the drivers of automobiles. Using this reasoning, one could argue the countryside should be covered with billboards to reduce the temptation to avert one's eyes from the road.

Brief for Appellants at 41, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (quoting Oklahoma *ex. rel* Dep't of Transp. v. Pile, 603 P.2d 337, 342-43 (Okla. 1979), *cert. denied*, 446 U.S. 980 (1982)).

ban they would have reached a different conclusion by applying a more strict set of requirements.

Even if Justice Stevens does not apply *Kovacs* he still seems willing to conclude that a city's interests in traffic safety and aesthetics are legitimate governmental goals which are sufficient to justify the ban.[107] Justice Rehnquist will uphold the total ban solely on the basis of the city's desire to enhance its own beauty.[108] Chief Justice Burger, believing that it makes no difference how the ordinance is classified, will continue to hold that the city has the right to impose a total ban.[109]

The plurality would not indicate whether it would uphold a total ban.[110] The element of uncertainty in assessing whether the Court would uphold the prohibition is in determining the approaches which these justices are likely to take. If three justices follow the *Schad* test, or any of the other cases within that total prohibition category, the ordinance would most likely be invalidated because the city would probably not be able to meet such a heavy burden of proof. If two justices choose not to be restrained by the classification and to apply some less strict standard of review such as those chosen by the Chief Justice and Justice Rehnquist, the ordinance would probably be upheld.

Ironically then, the element of uncertainty rests with the same justices who decided the Supreme Court's first billboard regulation case.[111] *Metromedia* is a good example of "the often unpredictable variety of response and lack of finality of resolution that the recurring tensions between speech and law in a free society are capable of producing."[112]

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107. "[A] wholly impartial total ban on billboards would be permissible. . . ." 453 U.S. at 553 (Stevens, J., dissenting).

108. "[T]he aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community. . . ." 453 U.S. at 570 (Rehnquist, J., dissenting) (citing Berman v. Parker, 348 U.S. 26, 32-33 (1954)).

109. "San Diego simply is exercising its police power to provide an environment of tranquility, safety, and as much residual beauty as a modern metropolitan area can achieve." 453 U.S. at 566 (Burger, C.J., dissenting).

110. 453 U.S. at 515 n.20. Justice Stewart has since retired from the Court.

111. At the time of this writing the City of San Diego was in the process of re-evaluating its billboard regulation. The City was unable at that time to venture a guess as to whether a total billboard prohibition would be declared valid. Telephone interview with C. Alan Sumption, Deputy City Attorney for the City of San Diego (Jan. 8, 1982).

112. F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 480 (1981).